Supreme Court, U.S.
FILED

No. 091207 APR 1 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

QUESTION PRESENTED

Whether this Court's precedent in *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) applies to determining whether a personnel action, defined at 5 U.S.C. §2302(a)(2)(A)(xi) as, "any other significant change in duties, responsibilities or working conditions," has occurred to a federal employee alleging whistleblower reprisal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE FACTS	2
REASONS FOR GRANTING THE PETITION	11
I. THIS COURT SHOULD VACATE AND REMAND THE JUDGMENT TO THE FEDERAL CIRCUIT WITH INSTRUCTIONS TO DEVELOP PRECEDENT FOR WHEN A PERSONNEL ACTION OCCURS AS A RESULT OF "ANY OTHER SIGNIFICANT CHANGE IN DUTIES, RESPONSIBILITIES, OR WORKING CONDITIONS," IN LIGHT OF *BURLINGTON*	11
II. REASONS WHY THE SOLICITOR GENERAL MAY DECIDE TO FILE AN "ACQUIESCENCE" IN RESPONSE TO THIS PETITION	21
III. OTHER REASONS TO GRANT THIS PETITION	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Burlington North. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006) ..... *passim*

Campion v. MSPB, 326 F.3d 1210 (Fed. Cir. 2003) 25

Carson v. Dept. of Energy, 77 MSPR 453 (1998) 4

Carson v. Dept. of Energy, 85 MSPR 171 (2000) 4

Carson v. Dept. of Energy, 88 MSPR 260 (2001) 4

Carson v. Dept. of Energy, 398 F.3d 1369 (Fed. Cir. 2005) 4, 23

Carson v. Office of Special Counsel, Docket No. 04-0315, Not Reported in F.Supp.2d, 2006 WL 785292 (D.D.C., March 27, 2006) 6

Carson v. Office of Special Counsel, Docket No. 09-5645, pending, Sixth Circuit Court of Appeals 6

Carson v. Department of Justice, Docket No. 10-0056, pending, Eastern District of Tennessee at Knoxville 23

Holderfield v. MSPB, 326 F.3d 1207 (Fed. Cir. 2003) 14, 25

TABLE OF AUTHORITIES – Continued

Page

Shivaee v. Dept. of Navy, 74 MSPR 383 (1997) 14, 16, 25

Weber v. Dept. of Army, 209 F.3d 756 (D.C. Cir. 2000) 6, 7

STATUTES

5 U.S.C. §1201 ..... 13, 23

5 U.S.C. §1214(b)(2)(B) 5, 15

5 U.S.C. §1214(b)(2)(C) 15

5 U.S.C. §1214(b)(3) 15

5 U.S.C. §1214(c) 15

5 U.S.C. §1214(e) 5

5 U.S.C. §1219(a)(3) 5

5 U.S.C. §1221 ..... 4, 7

5 U.S.C. §2301(b) 3

5 U.S.C. §2302(a)(2)(A)(xi) ..... *passim*

5 U.S.C. §2302(b)(8) 7, 13

5 U.S.C. §2302(b)(9) 5

5 U.S.C. §2302(c) 23

5 U.S.C. §7703(a)(2) 8, 25

5 U.S.C. §7703(b)(1) 8

5 U.S.C. §7703(c) 25, 26, 27

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. §7703(d) 15, 27

42 U.S.C. §7384(a) 4

P.L. 95-454, Civil Service Reform Act of 1978 (CSRA) 12

P.L. 101-12, Federal Whistleblower Protection Act of 1989 (WPA) 13, 23

P.L. 103-424, U.S. Office of Special Counsel Reauthorization Act 13

REGULATIONS

5 C.F.R. §1201.24 ..... 18, 28

5 C.F.R. §1201.25 ..... 18, 28

5 C.F.R. §1201.41(b)(5)(ii) 29

5 C.F.R. §1201.41(b)(9) 30

5 C.F.R. §1201.119 29

5 C.F.R. §1201.128 15

5 C.F.R. §1201.133 15

OTHER

S. Rep. No. 95-969 12

S. Rep. No. 103-358 13

S. Rep. No. 111-101 11

Federal Circuit Rule 36 ..... 9, 26, 27

OPINION BELOW

The Court of Appeals for the Federal Circuit, in *Carson v. Merit Systems Protection Board*, Docket No. 2007-3134, issued a judgment of affirmance without opinion, per Fed. Cir. R. 36, of the unpublished final decision of the Merit Systems Protection Board, Docket No. AT-1221-06-1125-W-1. The Federal Circuit decision is reported at 257 Fed. Appx. 268, 2007 WL 3333475 (C.A.Fed.).

JURISDICTION

The Federal Circuit filed its decision on November 7, 2007, and entered an order denying petitioner's motion for rehearing on November 17, 2009. On January 7, 2010, The Chief Justice granted petitioner's request for an extension of time and directed it be filed on or before April 1, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

5 U.S.C. §2302(a)(2)(A)(xi)

> For the purpose of this section a "personnel action" means any other significant change in duties, responsibilities, or working conditions.

STATEMENT OF THE FACTS

Petitioner Joseph Carson is a licensed professional engineer (PE) who has been a nuclear professional for over 30 years. He served as a submarine officer in Admiral Rickover's nuclear navy from 1976-1982. He worked as a start-up and test engineer at three different commercial nuclear plants from 1982-1989 and became a PE in 1984. He started his employment at the U.S. Department of Energy (DOE) as a nuclear safety engineer in January 1990.

As a PE, Mr. Carson has a positive legal and professional duty to "blow whistles," when necessary in his professional duties, to protect public and workplace health and safety, regardless of possible employer or client retribution.[1] [2] [3] DOE knew Mr. Carson was a PE when it hired him; the vacancy announcement for the position stated its educational requirements could be satisfied with a PE license. Additionally,

---

[1] Because the "paramount" objective of engineering ethics is protection of public health, safety and welfare, situations requiring "whistleblowing" can occur. For PE's, this duty is codified in the "rules of professional conduct" of State Engineering Boards, see <http://en.wikipedia.org/wiki/Engineering_ethics>.

[2] Mr. Carson has twice submitted the winning essay for the annual Milton Lunch Engineering Ethics Contest of the National Society of Professional Engineers (NSPE) <www.nspe.org/Ethics/EthicsResources/MiltonLunch/miltonlunch_pastwinners.html>.

[3] Mr. Carson also served on the American Nuclear Society (ANS) Special Committee on Ethics, which drafted the current ANS Code of Ethics <www.ans.org/about/coe/>. ANS is the largest nuclear professional society in world.

Mr. Carson's duty as a PE to "blow whistles," when necessary, is underscored by several of the "merit systems principles" – the core values of the federal civil service, codified at 5 U.S.C. §2301(b) – specifically §2301(b)(4) and (b)(9).

Mr. Carson first "blew whistles" about serious workplace and public health and safety issues in the Department of Energy in 1992, after his findings were suppressed by his management. As one result of his whistleblowing, the DOE Inspector General issued a March 1996 report on DOE's Accident Investigation Program, IG-0386, that resulted in the entire program being revamped.[4] His disclosures also played a role in the Secretary of Energy unilaterally terminating, on May 1, 1997, Associated Universities, Inc. (AUI) as the 50 year-long contractor of Brookhaven National Laboratory on Long Island, because of its significantly deficient environment, safety and health programs.[5] [6]

---

[4] Report on the Scope of the Accident Investigation of the Tristan Fire at the DOE Brookhaven National Laboratory <www.ig.energy.gov/documents/CalendarYear1996/IG-0386.txt>

[5] The link to DOE's Press Release is broken, the related May 1, 1997 statement of Lyle Schwartz, BNL's Interim Director is available at <www.bnl.gov/bnlweb/pubaf/pr/1997/bnlpr0501a97.html>.

[6] U.S. Office of Special Counsel Press Release of November 4, 1998 "OSC Announces Report To The President Of Safety Concerns At The U.S. Department Of Energy's Brookhaven National Laboratory" <www.osc.gov/documents/press/1998/pr98_10.htm>

Mr. Carson's disclosures and his "prevailing" in several whistleblower reprisal appeals in the 1990's also played a role, perhaps a significant role, in the passage of the landmark 2000 law, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), the first medical entitlement law since the 1970 "Black Lung" law. By it, about 50,000 workers in DOE's Cold War facilities (or their survivors), who were placed in harm's way in those workplaces without their knowledge of the hazards they faced or proper protection from them, have received about 5 billion dollars in compensation.[7] [8]

Between 1994 and 2001, Mr. Carson repeatedly prevailed in IRA appeals and Petitions for Enforcement against DOE unlawful reprisal under the Whistleblower Protection Act, 5 U.S.C. §§1221, 2302. He "prevailed" in no fewer than eight separate whistleblower or whistleblower-related decisions at the Board during this time, including three published Board decisions, *Carson v. Department of Energy*, 77 MSPR 453 (1998); 85 MSPR 171 (2000); and 88 MSPR 260 (2001). Some of the same agency wrongdoing is cited in the Federal Circuit's divided decision in *Carson v. Department of Energy*, 398 F.3d 1369, 1372-73, 1378-79 (Fed. Cir. 2005). To his knowledge,

---

[7] 42 U.S.C. §7384(a), which cites the "FINDINGS" section of P.L. 106-398, EEOICPA of 2000, elaborates on these hazards and that the workers were neither informed nor protected from them.

[8] Based on Department of Labor statistics, available at <www.dol.gov/owcp/energy/regs/compliance/weeklystats.htm>.

no federal employee, from the creation of the Civil Service in 1883 by the Pendleton Act, has "prevailed" in more whistleblower related litigation.

In contrast, even though he has also filed over 25 prohibited personnel practices (PPP) complaints with the U.S. Office of Special Counsel (OSC) since 1992, OSC has not once determined and/or reported to the Secretary of Energy, per 5 U.S.C. §1214(e) and/or §1214(b)(2)(B), "there is reasonable cause to believe" a PPP occurred. Such a §1214(e) report, together with the agency-head certified response, stating the corrective actions and their schedule, are permanent, publicly available records, per 5 U.S.C. §1219(a)(3).

In several PPP complaints Mr. Carson filed with OSC around 2004, he alleged a 5 U.S.C. §2302(b)(9) type PPP – reprisal for engaging in protected activity – occurred in which the involved agency action constituted a "personnel action" for creating "any other significant change in . . . working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi). The three agency actions cited by Mr. Carson in these PPP complaints were:

> 1) the agency's material breach of a 1994 MSPB enforceable settlement agreement of a whistleblower appeal,
>
> 2) the false, unfounded, and highly irresponsible statements of his supervisors to any number of Department of Energy employees in Oak Ridge, in Washington, DC, as well as to DOE contractor employees in Oak Ridge that he was "a threat of workplace violence," and

> 3) the failure of responsible agency officials to process three of his formal agency grievances he presented in 1999 and 2000, per the agency's grievance procedure.

In terminating its investigation of these PPP complaints, OSC stated that, absent specific MSPB determinations to the contrary, OSC would presume MSPB would make a negative determination – that no personnel action occurred.[9]

Mr. Carson sought a review of OSC's presumptive negative jurisdictional determinations at Federal District Court for the District of Columbia, via a petition for writ of mandamus. The Court determined that such OSC determinations were beyond the jurisdiction of the district court, in *Carson v. Office of Special Counsel*, Docket No. 04-0315, Not Reported in F.Supp.2d, 2006 WL 785292 (D.D.C. March 27, 2006), *5.

Mr. Carson is not an attorney, he engages in litigation because he wants to be able to do his duty as a PE and federal employee to protect others and not experience unlawful reprisal for it. He does not want others to experience what he has either. That is what 18 years of this matter boil down to. In retrospect, he would have appealed the district court decision because it conflicts with *Weber v. United States*, 209 F.3d 756, 759 (D.C. Cir. 2000) which finds district courts do have subject matter jurisdiction over OSC's

---

[9] See Joint Appendix A082-83

negative jurisdictional determinations. OSC has not accepted the ruling in *Weber* and still claims its negative jurisdictional determinations are beyond Court review, as indicated in its briefs in the pending case *Carson v. Office of Special Counsel*, Docket No. 09-5645, Sixth Circuit Court of Appeals.

At any rate, following the District Court decision, Mr. Carson ascertained if he re-filed the PPP complaints, citing the 5 U.S.C. §2302(b)(8) type PPP – whistleblower reprisal – and if OSC again closed the PPP investigation on presumptive jurisdictional grounds, he could then file an IRA appeal per 5 U.S.C. §1221 to obtain an MSPB jurisdictional determination and, if necessary, a review by the Federal Circuit of MSPB's jurisdictional rulings.

Also about this time, this Court created new case law possibly relevant to determining whether an agency action constituted a "personnel action" for being "any other significant change in duties, responsibilities, or working conditions" in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006).

So Mr. Carson filed a new, consolidated, PPP complaint with OSC, file no. MA-06-2118, alleging the whistleblower reprisal type PPP, citing the three agency actions described above along with the new Supreme Court precedent in *Burlington*. OSC closed

its investigation for the same presumptive jurisdictional reason as the previous PPP complaints.[10] Mr. Carson then filed an IRA appeal per 5 U.S.C. §1221 with MSPB, Docket No. AT-1221-06-1125-W-1.

On December 29, 2006, MSPB issued an initial decision which dismissed his appeal on jurisdictional grounds, based on the Administrative Judge's determination that Mr. Carson failed to nonfrivolously claim the challenged agency actions constituted personnel actions for creating "any other significant change in . . . working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi). The decision did not address whether *Burlington* was relevant. App. 3-20.

Mr. Carson decided against filing a petition for review of this initial decision with the Full MSPB so he could obtain a review by the Federal Circuit more quickly (in retrospect, he would have filed a PFR with the Full MSPB). The MSPB initial decision automatically became final on February 2, 2007 and Mr. Carson then filed a petition for review with the U.S. Court of Appeals for the Federal Circuit, per 5 U.S.C. §7703(b)(1).

MSPB became the respondent, per 5 U.S.C. §7703(a)(2), because the MSPB decision addressed only jurisdictional issues. An amicus curiae brief was filed on behalf of Mr. Carson. This resulted in the Department of Energy filing an intervenor brief. Even

---

[10] See Joint Appendix A079-81

though Mr. Carson was pro se, formal briefs were filed. No oral argument occurred. The Federal Circuit affirmed the MSPB decision without issuance of written opinion on November 9, 2007, per Fed. Cir. R. 36. App. 1-2.

Mr. Carson filed a timely petition for rehearing and rehearing en banc on January 25, 2008, which was not accepted by the Court because it had extra material in its addendum. Mr. Carson then timely filed an unopposed motion to allow the extra material in the addendum. Eighteen months later, on July 24, 2009, the Court, without ruling either on the unopposed motion to allow the extra material in the addendum or on the petition for rehearing, issued its decision as a mandate.

On September 25, 2009, Mr. Carson applied to The Chief Justice for an extension of time to file a petition for writ of certiorari. The Clerk of the Supreme Court notified him, in a letter dated October 1, 2009, that his application was out-of-time. Mr. Carson then contacted the Clerk of the Court for the Federal Circuit and, for the first time, realized that the Federal Circuit had not ruled on his unopposed motion to allow the extra material in the addendum or on the petition for rehearing/rehearing en banc before issuing the mandate. After discussing the situation with the Clerk and the representatives of MSPB and DOE, he filed an unopposed out-of-time motion for leave to file a petition for rehearing/ rehearing en banc which was granted on October 9, 2009. On November 17, 2009, the Federal Circuit

denied his petition for rehearing/rehearing en banc. App. 21-22

On January 7, 2010, The Chief Justice approved Mr. Carson's application for an extension of time to file a petition for writ of certiorari on or before April 1, 2010.

However, just as too many other concerned federal employees, Mr. Carson, together with his family, has paid a high cost for doing his duty as a PE employed by DOE as a nuclear safety engineer and for defending, upholding, and advancing his profession of engineering, its code of ethics, and the public health and safety, together with the merit system principles of the federal civil service. His testimony to the concerned federal employees – who regularly reach out to him – is dismal, "Look the other way if you can live with yourself." However, Mr. Carson cannot "live with himself" having to give such dismal advice, so he keeps trudging along, hoping to contribute to positive change in a broken system – which has left America much diminished and more threatened.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD VACATE AND REMAND THE JUDGMENT TO THE FEDERAL CIRCUIT WITH INSTRUCTIONS TO DEVELOP PRECEDENT FOR WHEN A PERSONNEL ACTION OCCURS AS A RESULT OF "ANY OTHER SIGNIFICANT CHANGE IN DUTIES, RESPONSIBILITIES, OR WORKING CONDITIONS," IN LIGHT OF *BURLINGTON*.

BACKGROUND

The background and current state of federal whistleblower protection is summarized in the first few pages of Senate Report 111-101, "Whistleblower Protection Enhancement Act of 2009," December 3, 2009. It accompanies S.372, which has the backing of the Administration. As of the date of this petition, S.372 is awaiting action by the Full Senate.

From the S. Rep. No. 111-101:

> Whistleblowers have long played a clear goal role in keeping our government honest and efficient, and the events of September 11, 2001 make even clear the fact that our citizens' safety depends on our ensuring that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. (pages 1-2) . . .
>
> * * *

The Civil Service Reform Act of 1978 (CSRA) established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.[11] As explained in the accompanying Senate report:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. . . . [T]hese conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation (pages 2-3).[12]

. . . However, in 1984, the MSPB reported that the Act had no effect on the number of whistleblowers and that federal employees continue to fear reprisal (page 3).[13] . . .

In response, Congress in 1989 unanimously passed the (Whistleblower Protection Act) WPA, which forbids retaliation against federal employees who disclose what they reasonably

---

[11] Civil Service Reform Act of 1978 (CSRA), P.L. 95-454

[12] S. Rep. No. 95-969, at 8

[13] See Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984)

> believe to be evidence of illegal or other seriously improper government activity (page 3).[14]
>
> . . . Congress substantially amended the WPA in 1994 as part of legislation to reauthorize the OSC and MSPB. The amendments were designed, in part, to address a series of actions by the OSC and decisions by the MSPB and the Federal Circuit Congress deemed inconsistent with the intent of the 1989 Act (page 3).[15]

As part of the 1994 amendments to the WPA, a "catch-all" personnel action – "any other significant change to duties, responsibilities, or working conditions," was added to the list of "personnel actions" in §2302(a)(2)(A). The purpose was described in the accompanying S. Rep. No. 103-358, "To Authorize Appropriations for the United States Office of Special Counsel, Merit Systems Protection Board, and for Other Purposes," August 23, 1994, starting at page 9 and continuing to page 10:

> Section 5(d) address[es] the narrow construction of the Whistleblower Protection Act with regard to the types of retaliatory action for which remedies are available. Under section 2302(b)(8), retaliation against the whistleblower constitutes a prohibited personnel

---

[14] Federal Whistleblower Protection Act of 1989 (WPA), P.L. 101-12

[15] U.S. Office of Special Counsel Reauthorization Act of 1994, P.L. 103-424

> practice only if it takes the form of a "personnel action." Unfortunately, there are many retaliatory actions that do not fall into the definition of personnel actions.
>
> . . . The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited regardless what form it may take. For this reason, section 5(d) would amend the Act to cover any action taken to discriminate or retaliate against the whistleblower because of his/her protected conduct, regardless of the form that discrimination or retaliation may take.

The primary reason this Court should grant the petition, vacate the decision and remand it to the Federal Circuit is to create precedent about this 1994 addition to the WPA, in light of *Burlington*.

At this point, almost 16 years after this "catch-all" personnel action was added to strengthen protection for federal whistleblowers, the Federal Circuit has yet to review it.[16] [17] Additionally, there is no precedent at MSPB about what, if any, impact, *Burlington*

---

[16] See *Holderfield v. MSPB*, 326 F.3d 1207, 1209 (Fed. Cir. 2003).

[17] The Intervenor's brief, page 13, makes the same point, that *Shivaee v. Dept. of Navy*, 74 MSPR 383 (1997) has not been endorsed by the Federal Circuit.

has on this section of law. Arguably, this Federal Circuit judgment conflicts with *Burlington*, and, therefore, warrants this Court's action by Rule 10(c) of the Rules of the Supreme Court.

Additionally, as one result of the lack of relevant precedent at the Federal Circuit, OSC uses that lack as grounds to close PPP complaints that allege this type of "personnel action," as the PPP complaints associated with this case demonstrate. (If OSC wanted to establish case law for this catch-all personnel action at MSPB, it could have done so years ago, which would have led to the creation of relevant Federal Circuit precedent).[18]

Additionally, S.372 (as the corresponding House Bill, H.R. 1507), does not amend the current list "personnel actions" at §2302(a)(2)(A), so unless this Court remands the case back to the Federal Circuit, it may be many years more before relevant case law is created – that OSC can finally apply in performing its primary statutory duty of protecting concerned federal employees from reprisal, so they do not need to hock their homes and savings to pursue year after

---

[18] OSC can seek corrective action on behalf of an employee affected by a PPP at MSPB per §1214(b)(2)(C) and (b)(3) and 5 C.F.R. §1201.128. OSC does not have independent litigating authority, but if MSPB rules against OSC in a corrective action petition, the involved employee can seek a judicial review at the Federal Circuit, per §1214(c) and 5 C.F.R. §1201.133. If MSPB rules for OSC, then OPM can seek a judicial review, per §7703(d).

year of redress via litigation – frequently at the cost of their marriages, if not health and career.

How the underlying MSPB decision conflicts with relevant MSPB precedent and *Burlington*.

Even though there is no Federal Circuit precedent for determining what can create "any other significant change in duties, responsibilities or working conditions," such precedent exists at MSPB, *Shivaee v. Dept. of Navy*, 74 MSPR 383, 388 (1997), which is quite close to that given in *Burlington* at p. 1215 – that if the agency/employer actions would tend to deter other similarly situated employees from engaging in protected activities or making protected disclosures, they qualify.

From *Shivaee*, at 388:

> . . . the provision adding, "any other significant change in duties, responsibilities, or working conditions" to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.

From *Burlington*, at 2415:

> In our view, a plaintiff must show that a reasonable employee would have found the

> challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 438 F.3d, at 1219 (quoting *Washington*, 420 F.3d, at 662).

In the MSPB decision, the Administrative Judge did not apply this criteria, even though he correctly quoted it from *Shivaee* at App. 10-11. However, he then improperly required a showing that the agency actions against Mr. Carson actually deterred other employees from making protected disclosures, a much higher burden, see App. 11-12 (emphasis added):

> For the following reasons, I find the appellant's aforementioned allegations do not constitute nonfrivolous allegations that the agency took personnel actions against him within the meaning of 5 U.S.C. §2302(a)(2)(A)(xi) . . .
>
> . . . the appellant essentially alleges that the agency's failure to comply with a 1994 settlement agreement in one of his previous appeals has created an environment within the workplace **wherein employees are "deterred" from engaging in protected activity** such as making protected disclosures of agency wrongdoing. Appellant's claims in this regard are generalized and unspecified in that he has failed to describe any specific instance wherein the agency's alleged noncompliance with its 1994 settlement agreement in his case **resulted in any other employees' failure to engage in**

> **protected activity**. Likewise, I note appellant's claim in this regard relates to the circumstances of his fellow employees and not himself. Thus, I find that the appellant has failed to nonfrivolously allege that the agency's **alleged failure** to comply with its 1994 settlement agreement resulted in a significant change in *his* duties, responsibilities, and/or working conditions, as mandated by the statute.

The MSPB decision mentioned *Burlington* only in passing, by quoting an OSC letter mentioning it, see App. 9, footnote 1. The MSPB decision neither addressed the relevancy of *Burlington* nor applied it.

The MSPB decision also incorrectly describes the agency activities Mr. Carson appealed, see App. 7-8. Mr. Carson, per MSPB regulation at 5 C.F.R. §1201.24, described the three involved agency actions in his MSPB appeal.[19] The agency, in its response to his appeal, made per 5 C.F.R. §1201.25, agreed that two had happened and asked for additional information about the third, which he later provided.[20]

In responding to the Board's Jurisdictional Order,[21] Mr. Carson did not repeat this previously provided information, instead, he applied the criteria of *Burlington* and *Shivaee* to the agency actions in

---

[19] See Joint Appendix A135-137

[20] See Joint Appendix A112-115

[21] See Joint Appendix A069-70

question. From Mr. Carson's response to the jurisdictional order, described in the MSPB decision at App. 7-8.[22]

The agency actions involved are personnel actions

In June 2006, the Supreme Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006) created a specific criteria relevant to existing Board precedent that whether an agency action created "any significant change in working conditions" should be "interpreted broadly." Specifically, the Supreme Court ruled,

> In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

This Supreme Court ruling is consistent with the legislative history for the 1994 amendments to the WPA, cited by the Board in *Shivaee*.

Applying the repeatedly cited Board precedent to "broadly interpret," informed by the recent Supreme Court precedent in *Burlington*, to the three agency actions involved in this appeal is straightforward:

> 1. An agency employee makes protected disclosures and alleges reprisal in a formal

---

[22] See Joint Appendix A077

appeal. He settles the case, but the agency fails to comply with the settlement agreement. Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

2. An agency employee makes protected disclosures and alleges reprisal in a formal appeal. He settles the case, but agency employees then start a rumor campaign that he is a "threat of workplace violence." Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

3. An agency employee makes protected disclosures and alleges reprisal in a formal appeal. He also files related grievances, per the agency grievance procedure. The agency fails to comply with its agency grievance procedure by failing to process his grievances or inform the employee why. Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

Mr. Carson, in his response to the jurisdictional order, applied the *Shivaee* and *Burlington* criteria to the involved agency actions; however, the MSPB decision incorrectly describes and treats his analysis of the alleged agency actions as "his list of alleged personnel actions," see App. 7.

II. REASONS WHY THE SOLICITOR GENERAL MAY DECIDE TO FILE AN "ACQUIESCENCE" IN RESPONSE TO THIS PETITION

As Mr. Carson understands the Court's statistics, this petition has about a 1 in 500 chance of being granted, unless the Solicitor General files an "acquiescence" supporting it. He understands the Solicitor General files a response to about 10% of the petitions for writ of certiorari it receives. He also understands that Supreme Court Rule 12.6 gives the Solicitor General only 20 days, with no possibility of a time extension, to file an acquiescence to this petition for writ of certiorari.

The reasons why the Solicitor General may decide to file a brief supporting Mr. Carson's petition include:

1. Improving protection of concerned federal employees is also a stated objective of the

Obama Administration[23] and the Administration's support of S.372 has been publicized.

2. The position of Special Counsel, head of OSC, has been vacant for 18 months. Mr. Carson is a leader in efforts to have the President nominate, and the Senate confirm, a Special Counsel who will adopt a platform of hope and reform at OSC, as articulated by David Nolan, Esq., an overt candidate for the position, at <www.NolanforOSC.com>.

3. Creating precedent at the Federal Circuit for "any other significant change in duties, responsibilities, or working conditions," particularly in light of *Burlington*, will allow OSC to apply that criteria – not only prospectively, but retrospectively back to 1994.

4. OSC has enormous powers (largely untested in Court) to protect federal employees from PPP's. It can re-open a closed investigation at any time, it can initiate a new investigation without a specific complaint – and there is no statute of limitations for a PPP. Even if the federal employee has pursued remedy for the PPP at the MSPB without success, OSC is not precluded from doing so on behalf of that employee – res judicata would not apply, OSC is a different party,

---

[23] Then-Senator Obama responded to a survey on improving whistleblower protection on May 8, 2007 <http://whsknox.blogs.com/nolan_osc/obama.survey.scanned.pdf>

seeking remedy via a different section of law.[24] By the WPA of 1989, OSC has a positive duty, as a federal law enforcement agency, to "act in the interests" of federal employees seeking its protection from PPP's, so OSC's taking such action is warranted by its reasons for existence.[25]

5. The Attorney General, as other agency heads, has a positive statutory duty to "prevent PPP's," per § 2302(c), and is apparently unable to demonstrate compliance with this vital duty to Department of Justice employees.[26] Four widely publicized joint reports of the Department of Justice Inspector General and Office of Professional Responsibility in the past 2 years found widespread PPP's in hiring practices in the Department of Justice, and, apparently, in the firing of at least one of the nine US Attorneys, during the Bush Administration.[27] These reports indicated a failure of Department of Justice

---

[24] The doctrine of res judicata is summarized in *Carson v. Department of Energy*, 398 F.3d 1369, 1375, n. 8 (Fed. Cir. 2005).

[25] The appendix of 5 U.S.C. §1201 contains section 2 of P.L. 101-12, the WPA of 1989, which gives OSC this mandate at section 2(b)(2)(B).

[26] As of the date of this filing, the Department of Justice has failed to provide any responsive records to Mr. Carson's Freedom of Information Act request, made in November 2009, for such records, see *Carson v. Department of Justice*, docket no. 10-0056, Eastern District of Tennessee at Knoxville.

[27] The four reports are available at <www.justice.gov/opr/inv-rpts.htm>.

employees to "blow whistles" to appropriate authorities about PPP's they witnessed. Based on what he has experienced, Mr. Carson cannot blame Department of Justice employees for "looking the other way" at such lawbreaking, even though it harms rule of law.

6. If the Solicitor General files an acquiescence and/or if this Court grants this petition in its absence, vacates the judgment and remands the case with instructions for the Federal Circuit to issue a published decision that establishes precedent for "any other significant change in duties, responsibilities, or working conditions," in light of *Burlington*, and applies it to the facts of this case, then Congressional intent, as repeatedly expressed in legislation and its legislative history, in protecting concerned federal employees from reprisal, could be significantly advanced.

III. OTHER REASONS TO GRANT THIS PETITION

Rule 10(a) of the Rules of the Supreme Court states this Court may grant a petition for certiorari because a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The following detail reasons why this Court may find it appropriate to grant this petition on this basis.

The Federal Circuit misapplied Fed. Cir. R. 36 in issuing a judgment of affirmance without opinion.

The panel of the Court entered a judgment of affirmance without opinion, even though the criteria for issuing a judgment of affirmance without opinion, per Fed. Cir. R. 36, are not met in this case. By Fed. Cir. R. 36 at least one of five listed criteria must be met AND an opinion would have no precedential value.

Contrary to this, an opinion in this case would have clear precedential value, because there is no precedent at the Federal Circuit for when a personnel action occurs as a result of "any other significant change in duties, responsibilities or working conditions." See *Holderfield v. MSPB*, 326 F.3d 1207, 1210 (Fed. Cir. 2003), *Shivaee v. Dept. of Navy*, 74 MSPR 383, 388 (1997), and *Burlington* p. 2415.

Of the five criteria for issuing a Judgment of Affirmance Without Opinion in Fed. Cir. R. 36, only the last two are relevant to an MSPB decision. Criteria (d) states, "the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review." MSPB is the respondent in this petition for review because the case involves MSPB's jurisdiction, see 5 U.S.C. §7703(a)(2). By *Campion v. MSPB*, 326 F.3d 1210, 1213 (Fed. Cir. 2003), the Court reviews issues of law, including the jurisdiction of the Board, without deference to the Board's opinion. In other

words, the Court performs *de novo* reviews of issues of law contained in MSPB decisions and petitioner respectfully states that a *de novo* review of the involved issues of law, including a previously untested issue of law, is not adequately documented in a judgment of affirmance without opinion.

The "standard of review" for MSPB cases at the Federal Circuit is found at §7703(c); by §7703(c)(1) the Court must set aside any MSPB decision found "otherwise not in accordance with law." Because this case involves a novel question of law at the Federal Circuit, it cannot be affirmed by this criteria. The MSPB decision relies on an MSPB precedent, *Shivaee*, which has not been adopted as lawful at the Federal Circuit.

Criteria (e) of Fed. Cir. R. 36, "a judgment or decision has been entered without an error of law," requires a determination that the Federal Circuit could not make in this case, because there is no precedent at the Federal Circuit for the central issue of law – when do agency actions become a "personnel action" for creating "any other significant change in duties, responsibilities, or working conditions?"

Additionally, according to case records available on Westlaw on the date of this filing, MSPB has been a party at the Federal Circuit in 1889 cases. In only 65 of those cases was the decision issued per Fed. Cir. R. 36. Of those 65 cases, only 9 involved an intervenor and in only one case – this one – was there both an intervenor and and amicus curiae. In only one case –

this one – was a petition for panel rehearing filed subsequent to a Fed. Cir. R. 36 disposition.

Both MSPB's and the Intervenor's Briefs contain much improper argument

The only agency that can file a petition for review of an MSPB decision at the Federal Circuit is the Office of Personnel Management (OPM) and it can only do so in the limited circumstances described at §7703(d). Agencies such as MSPB and DOE cannot file petitions for review or cross petitions for review at the Federal Circuit.

Employees can file petitions for review (PFR), but the review standard used by the Federal Circuit for their PFR's is limited, as specified at §7703(c). Agency responses to employee PFR's cannot make new argument, not found in the MSPB decision or argue against the findings of the MSPB decision.

The MSPB decision made no ruling on whether *Burlington* was relevant, it mentioned *Burlington* only once, in quoting an OSC letter to Mr. Carson. Despite that, both the MSPB and DOE briefs to the Federal Circuit argued that Burlington was not relevant.[28]

The MSPB decision found, consistent with DOE's response to Mr. Carson's appeal, that they had occurred

---

[28] See MSPB's brief at 11-12 and DOE's brief at 11-13

to Mr. Carson. The agency's response to his IRA appeal, made per 5 C.F.R. §1201.25, does not dispute that they happened to him (although it requests additional information about one because the agency could not locate the relevant records). An excerpt from it follows:[29]

> . . . Appellant makes three statements listing alleged actions he considers to be prohibited personnel practices. . . . Appellant's third allegation, that the agency "failed to process several of the appellant's formal grievances," lacks the specificity required by 5 C.F.R. §1201.24(a). Without more specificity the agency cannot formulate a cogent response. The agency requests the Board require Appellant to provide information substantiating this allegation.

Consistent with the undisputed case record established by these documents, the MSPB determined that they happened to Mr. Carson, see App. 7-8. In describing each agency action, the Administrative Judge makes clear it happened to Mr. Carson by using phrases as "the terms of his settlement agreement," "they alleged that the appellant posed a 'threat of workplace violence,'" and "failing to process his grievances or inform him why" Despite this, the Intervenor, as the Respondent, improperly sought the

---

[29] See Joint Appendix A116-118

Federal Circuit to overturn these MSPB determinations of fact.[30]

It is improper and/or unlawful, by 5 U.S.C. §7703(a) and (d); 5 C.F.R. §§1201.119 and 120; and FRAP 28.1, for either the respondent or the intervenor to seek this Court's review of these factual determinations by the MSPB. The Federal Circuit does not have the power to review such claims. Mr. Carson brought these concerns to the Court's attention, they were not acted upon.[31]

The MSPB Administrative Judge, contrary to MSPB regulation, failed to fully develop the case record on the significant issue of law regarding the relevance and/or application of *Shivaee* and *Burlington* to the involved agency actions

Contrary to 5 C.F.R. §1201.41(b)(5)(ii), the AJ failed to fully develop the case record on the relevancy and/or application of *Shivaee* and *Burlington* to the involved agency actions. He did not allow the intervenor to reply to Mr. Carson's response to his jurisdictional order, even though both Mr. Carson's IRA appeal and his response to the jurisdictional order described these cases and the underlying question of law as essential to his claims.

---

[30] See MSPB's brief at 5, 12 and 13. See DOE's brief at 2, 3 and 6-10

[31] See Mr. Carson's reply brief to the intervenor's brief at 7-10

This also appears contrary to 5 C.F.R. §1201.41(b)(9), which requires the AJ take specific actions to ensure the case record for questions of law to be fully developed. However, the intervenor did not object, during the MSPB adjudication, to its lack of opportunity to fully develop the case record for this essential question of law, nor did it seek leave to file a related memorandum of law.

CONCLUSION

For the above reasons, the Court should grant this petition, vacate the decision of the Federal Circuit, and remand the case to the Federal Circuit with instructions for it to address, in light of *Burlington*, when agency actions create "any other significant change in duties, responsibilities or working conditions" and apply its reasoning to the involved agency actions.

Respectfully submitted,

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3134

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

and

DEPARTMENT OF ENERGY,

Intervenor.

Joseph P. Carson, of Knoxville, Tennessee, pro se.

Jeffrey A. Gauger, Acting Associate General Counsel, Office of the General Counsel, United States Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were *B. Chad Bungard,* General Counsel, and *Rosa M. Koppel,* Deputy General Counsel.

Roger A. Hipp, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for intervenor. With him on the brief were *Peter D. Keisler,* Acting Attorney General, *Jeanne E. Davidson,* Director, and *Todd M. Hughes,* Deputy Director.

David B. Nolan, of Alexandria, Virginia, for amici curiae, P. Jeffrey Black, et al.

Appealed from: United States Merit Systems Protection Board

Judgment

ON APPEAL from the United States Merit Systems Protection Board

In CASE NO(S). AT1221061125-W-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge* and MOORE, *Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED: November 9, 2007

/s/ Jan Horbaly
Jan Horbaly, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,

v.

DEPARTMENT OF ENERGY,
Agency.

DOCKET NUMBER
AT-1221-06-1125-W-1

DATE: December 29, 2006

Joseph P. Carson, Knoxville, Tennessee, pro se.

Mary D. Copeland, Esquire, Oak Ridge, Tennessee, for the agency.

BEFORE
Anthony W. Cummings
Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 2, 2006, Joseph P. Carson filed an individual right of action (IRA) appeal with the Board's Atlanta Regional Office in which he alleged that the Office of Special Counsel (OSC) failed to protect him from prohibited personnel practices by his employing agency, the Department of Energy. Based on the following analysis and findings, the appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Jurisdictional Requirements

Under the provisions of the Whistleblower Protection Act (WPA), an employee who believes that he was retaliated against because he made a protected whistleblowing disclosure may file an IRA appeal with the Board. *See* 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2 (2006). Before filing an IRA appeal with the Board of an action that is not an "otherwise appealable action," the individual must first seek corrective action from the OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(a) (2006). The Board may only review those disclosures and personnel actions that an appellant raised before the OSC. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1037 (Fed. Cir. 1993); *Lewis v. Department of the Army*, 58 M.S.P.R. 325, 332 (1993).

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). The question of whether the appellant has made a nonfrivolous allegation is determined based on the written record, without holding a jurisdictional hearing. *See Spencer v.*

Department of the Navy, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Iyer v. Department of the Treasury*, 95 M.S.P.R. 239, ¶ 4 (2003), *aff'd*, 104 F. App'x. 159 (Fed. Cir. 2004).

For an appellant to establish that he has exhausted his administrative remedies before OSC, except in situations where the underlying personnel action is otherwise appealable to the Board, the appellant must show that either: (a) OSC has notified him "that an investigation concerning [him] . . . has been terminated," and "no more than 60 days have elapsed since notification was provided" to him; or (b) 120 days have elapsed since the appellant sought corrective action from OSC, and he "has not been notified by [OSC] that [it] shall seek corrective action on [his] behalf." 5 U.S.C. § 1214(a)(3). In the instant appeal, it is undisputed that the appellant filed a complaint with OSC and that OSC subsequently notified him that it had terminated its investigation. Accordingly, I find that the appellant has exhausted his administrative remedies before OSC.

Regarding whether the appellant has made a nonfrivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, the appellant is not required to *prove* that he made protected disclosures but, rather, is required merely to make a nonfrivolous allegation that at least one of his disclosures was protected under 5 U.S.C. § 2302(b)(8). *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 11 (2004); *Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247, ¶¶ 9-10 (2003).

Protected whistleblowing takes place where an appellant made a disclosure that he reasonably believed evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *Grubb*, 96 M.S.P.R. 377, ¶ 11; *see also DiGiorgio v. Department of the Navy*, 84 M.S.P.R. 6, ¶ 14 (1999).

In an IRA appeal, a 'personnel action' is defined as: (1) an appointment; (2) a promotion; (3) an adverse action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation under 5 U.S.C. chapter 43; (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (10) a decision to order psychiatric testing or examination; or (11) any other significant change in duties, responsibilities, or working conditions. *See* 5 C.F.R. § 1209.4.

The appellant failed to make allegations of fact, which if proven, would show that the Board has jurisdiction over this appeal.

By Order dated October 20, 2006, the appellant was apprised of the jurisdictional issue this case presents. Appeal File (AF), Tab 6. Specifically, the

appellant was informed that he had to file a statement of factual evidence, *i.e.*, he had to assert non-frivolous allegations of jurisdiction supported by affidavits or other evidence, responding to the requirements noted above. *Id.* He was informed that the written record would determine whether his allegations were non-frivolous. *Id.* He was also informed that if he made nonfrivolous allegations of fact to establish jurisdiction, he would be entitled to a hearing on the merits of his claim, and if he did not his appeal would be dismissed based on lack of Board jurisdiction. *Id.*

In response to the Board's October 20, 2006 Order on the jurisdictional issue, the appellant submitted the following information as his list of alleged personnel actions:

1. In prior appeals to the Board, it was found that the appellant was a whistleblower and one of his cases settled. The appellant contends that, "any other significant change in working conditions" occurred and resulted in a personnel action when other agency employees were allegedly deterred "from making protected disclosures or engaging in protected activities" due to the agency's alleged failure to comply with the terms of his settlement agreement.

2. Appellant contends that "any other significant change in working conditions" occurred and resulted in a personnel action when agency employees started "a

rumor campaign" in which they alleged that appellant posed "a threat of workplace violence" which, according to appellant, was due to the agency's alleged failure to comply with the terms of the settlement agreement reached in his prior whistleblower appeals.

3. Appellant contends that "any other significant change in working conditions" occurred and resulted in a personnel action when the agency allegedly deterred other employees from "making protected disclosures or engaging in protected activities" by allegedly failing to process his grievances or inform him why it failed to do so after he blew the whistle as indicated in his prior whistleblower appeals to the Board.

AF, Tab 8, p. 7.

For the following reasons, I find that the appellant has failed to make nonfrivolous allegations of whistleblowing. First, in his response to the jurisdictional issue, appellant does not allege any new set of facts other than those he has previously raised in his numerous prior IRA appeals filed over the years between 1992 and 2005. Indeed, in his response, the appellant specifically acknowledges this fact as follows:

> "So while the appellant did not cite make (sic) make new allegations or provide additional evidence in his PPP complaint MA-06-2118. . . ."

See AF, Tab 8, p. 5. This comports with OSC's assessment of appellant's current PPP complaint as stated in its August 29, 2006 letter in which it terminated its investigation into appellant's current PPP complaint.[1] *See* AF, Tab 1. Thus, appellant is relying upon

---

[1] In its August 29, 2006 letter closing its inquiry into the appellant's complaint, OSC stated that the appellant's current complaint "concerns prior reprisal for whistleblowing complaints that you (the appellant) had filed with OSC (closed by OSC between 1992 and 2005)" and that "you have offered no new factual allegations. . . ." *See* AF, Tab 1. Furthermore, OSC repeated the claims appellant raised in both his "current complaint form" as well as in his written response to OSC's letter announcing its intention to close its inquiry into his current prohibited personnel practice complaint. Those claims included, in pertinent part, appellant's contention that:

a) OSC's previous interpretations of "any other significant change in working conditions" are incorrect in light of the Board's ruling in *Roach v. Department of the Army*, 82 M.S.P.R. 464 (1999); and

b) the Supreme Court's decision in Burlington Northern and Santa Fe Railway Co., v. White, 126 S.Ct. 2405 (2006), (a) established new law relevant to the jurisdictional issue, (b) by the Court's analysis, "any other significant change in working conditions" cannot have a threshold higher than "employer's action that could well dissuade a reasonable worker from making or supporting a charge of discrimination; (c) given the Court's holding, "it is now 'open and shut' that he [appellant] experienced" personnel actions in his prior PPP complaints; and (d) based on this decision, OSC should reverse its earlier jurisdictional determinations in his prior complaints;

AF, Tab 1.

disclosures already ruled as protected under 5 U.S.C. § 2302(b)(8). However, in the instant appeal, appellant now claims that the agency's alleged failure to comply with a settlement agreement reached with the agency in his prior IRA appeal in 1994 has resulted in new personnel actions based upon it's [sic] allegedly creating significant changes in his working conditions within the meaning of 5 U.S.C. § 2302(a)(2)(A)(xi).

Prior to October 29, 1994, the definition of "personnel action" included "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level." 5 U.S.C. § 2302(a)(2)(A)(x). Effective October 29, 1994, this definition was amended to state: "[a]ny other significant change in duties, responsibilities, or working conditions." Pub.L.No. 103-424 § 59(a)(1), (2), 108 Stat. 4363 (codified as amended at 5 U.S.C.A. § 2302(a)(2)(A)(xi)). The 1994 amendment's deletion of the qualifying language "which is inconsistent with the employee's salary or grade level" enlarged the category of actions encompassed in the definition of "personnel action." *See Shivaee v. Department of the Navy,* 74 M.S.P.R. 383, 388 (1997), *citing Briley v. National Archives and Records Administration,* 71 M.S.P.R. 211, 223 (1996). The legislative history shows that this provision for "personnel action" is to be interpreted broadly and intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis. *See* 140 Cong. Rec. H11, 421

(daily ed. Oct. 7, 1994) (statement of Rep. McCloskey).

For the following reasons, I find the appellant's aforementioned allegations do not constitute nonfrivolous allegations that the agency took personnel actions against him within the meaning of 5 U.S.C. § 2302(a)(2)(A)(xi). Since appellant's allegations highlighted in his jurisdictional response paragraphs (1) and (3) are essentially identical, I will address them first.

In paragraphs (1) and (3) of his response to the jurisdictional issue as highlighted above, the appellant essentially alleges that the agency's failure to comply with a 1994 settlement agreement in one of his previous appeals has created an environment within the workplace wherein employees are "deterred" from engaging in protected activity such as making protected disclosures of agency wrongdoing. Appellant's claims in this regard are generalized and unspecified in that he has failed to describe any specific instance wherein the agency's alleged noncompliance with its 1994 settlement agreement in his case resulted in any other employees' failure to engage in protected activity. Likewise, I note appellant's claim in this regard relates to the circumstances of his fellow employees and not himself. Thus, I find that the appellant has failed to nonfrivolously allege that the agency's alleged failure to comply with its 1994 settlement agreement resulted in a significant change in *his* duties, responsibilities, and/or working conditions, as mandated by the statute.

Accordingly, I find that this allegation is not a personnel action within the meaning of the WPA.

Additionally, I find appellant's allegation that the agency's alleged noncompliance with a 1994 settlement agreement resulted in a "rumor campaign" is similarly vague and generalized. For instance, to the extent appellant is claiming that the agency's alleged noncompliance with the 1994 settlement agreement constitutes the "personnel action" resulting in the "rumor campaign," I find such is not the case since the appellant has not sufficiently shown how the agency's alleged act of noncompliance with his settlement agreement was responsible for significantly changing his working conditions.

Likewise, to the extent appellant is claiming the "rumor campaign" itself constitutes a personnel action, I find that the rumors of appellant posing a threat of workplace violence do not constitute actions that were taken by, or on behalf of the agency, or in which the agency could be deemed complicit. *Cf. Arauz v. Department of Justice,* 89 M.S.P.R. 529, 533 (2001). Rather, if indeed true, they describe actions initiated by appellant's co-workers and, therefore, cannot constitute covered 'personnel actions' for WPA purposes; *i.e.*, the actions of an employee representing agency management. *See* 5 U.S.C. § 2302(b) ('Any employee' in authority prohibited from taking various actions, including those listed in section 2302(b)(8).)

Thus, I find that appellant's allegations in this regard do not constitute personnel actions within the

meaning of 5 U.S.C. § 2302(a)(2)(A)(xi), in that appellant has failed to sufficiently show how management is responsible for creating an environment wherein such rumors would fester. Employees talk, and appellant has failed to show, other than via bare allegations, how any affirmative action or lack of action by the agency has resulted in this talk among agency employees. Consequently, I find that the appellant has failed to allege personnel actions with respect to his generalized complaints about his working conditions.

Finally, assuming *arguendo* that appellant's allegations of a "rumor campaign" or that agency noncompliance with a settlement agreement resulted in deterring employees from engaging in protected activity constituted personnel actions, I find that the appellant failed to nonfrivolously allege that the protected disclosures of his prior IRA appeals were a contributing factor to the agency taking these personnel actions. As previously noted, to establish Board jurisdiction over the IRA appeal, the appellant also must nonfrivolously allege that his whistleblowing activity was a contributing factor in the agency's decision to take or fail to take a personnel action. Thus, to satisfy the contributing factor jurisdictional criterion, the appellant must raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Perkins v. Department of Veterans Affairs*, 98 M.S.P.R. 250, ¶ 19 (2005). The appellant may demonstrate that a disclosure was a

contributing factor in a personnel action through circumstantial evidence, including, but not limited to, evidence that the official taking the personnel action knew of a disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Easterbrook v. Department of Justice,* 85 M.S.P.R. 60, ¶ 7 (2000).

With regard to the knowledge prong of the knowledge/timing test, the appellant may establish, for jurisdictional purposes, that a disclosure was a contributing factor in a personnel action by nonfrivolously alleging that the official taking the personnel action had constructive knowledge of the disclosure; constructive knowledge may be established by demonstrating that an individual with actual knowledge of the disclosure influenced the official(s) accused of taking the retaliatory action. *See Marchese v. Department of the Navy,* 65 M.S.P.R. 104, 108 (1994). Regarding the timing prong of the knowledge/timing test, the relevant inquiry is the time between when the agency official taking the action had actual or constructive knowledge of the disclosure – not necessarily the date of the disclosure itself – and the time that the action was taken. *Caddell v. Department of Justice,* 57 M.S.P.R. 508, 514 (1993).

In the instant appeal, based upon the transcript of appellant's prior appeal before Judge Stuart Miller,

a Mr. Cooper[2] testified that he first believed appellant might pose a threat of workplace violence as early as 1992, and that he discussed this belief with other employees at that time. *See* AF, Tab 8, sub-tab 6. In his response to the Board's jurisdictional order, appellant states that the disclosures previously found to be protected by the Board are found in the Board's initial decision in *Carson v. Department of Energy,* AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999). In that decision, Judge Miller found that the appellant testified to only six of at least twenty disclosures he made between 1991 and 1998. *See Carson v. Department of Energy,* AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999), p. 3. Judge Miller found that the first of appellant's six disclosures occurred in "early 1993" and appellant testified that:

> "he did a review of programs in the Oak Ridge Operations in which he found a program "that was broken." He testified that there were no records of accidents, investigations or corrective measures that were recommended or implemented. This was important because it was essential to have a history in order to identify root causes to prevent the same problems from reoccurring both at Oak Ridge and across the agency (DOE). *See* Appellant's Exhibit K, pp. 8-10. He wrote a draft report of his findings and attached it to a "larger" report which was

---

[2] William Cooper, appellant's supervisor in 1992. *See Carson v. Department of Energy,* 85 M.S.P.R. 171, 174 (2000).

> furnished to his management chain (Senior Residents Cooper and Hillman)."

See id. at p. 3. The next four disclosures identified in Judge Miller's decision all occurred after 1993, most notably in 1996 and 1997. *See id.* Indeed, the evidence suggested that the agency's failure to heed appellant's disclosure of a "lack of reporting and documentation of safety occurrences/accidents and corrective measures," which appellant initially identified in 1993 and again in 1996, may have indirectly contributed to the death of a welder who burned to death in February 1997. *See id.*

With respect to these disclosures identified by appellant between 1993 and 1997, I find that they obviously could not have been a contributing factor to the rumors circulating around appellant's workplace as early as 1992 of appellant posing a threat of workplace violence since the evidence shows these alleged rumors occurred prior to the disclosures.

In terms of the final disclosure, appellant testified before Judge Miller that he reported the final disclosure in 1991 and 1992 to the Inspector General that the use of support services contractors/consultants "was excessive and wasteful." *See Carson v. Department of Energy*, AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999), p. 6. However, appellant has not shown how "the fact of, or content of," that disclosure was one factor that tended to affect the personnel action in any way. *See Perkins*, 98 M.S.P.R., ¶ 19. Indeed, since I have previously found that appellant's

allegation of "a rumor campaign" and that the agency's noncompliance with the 1994 settlement agreement served to "deter" other employees from engaging in protected activity do not constitute personnel actions, this point is moot.

Accordingly, for all of the foregoing reasons, I find that the appellant's allegations do not constitute nonfrivolous allegations of whistleblowing.[3]

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Anthony W. Cummings
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***February 2, 2007,*** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days

[3] Because the appellant's submissions on the jurisdictional issue failed to raise nonfrivolous allegations of fact that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action, no hearing was held in this appeal. *See Spencer,* 327 F.3d at 1356; *Yunus,* 242 F.3d at 1371.

after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to

the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice,* and Forms *5, 6,* and *11.*

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

(Filed Nov. 17, 2009)

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate has already issued.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 11/17/2009

cc: Joseph P. Carson
Jeffrey Gauger, Roger A. Hipp
David Brian Nolan

CARSON V MSPB, 2007-3134
(MSPB – AT1221061125-W-1)

(2)

No. 09-1207

Supreme Court, U.S.
MAY 6 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

PURPOSE OF THIS SUPPLEMENTAL BRIEF

Joseph Carson is pro se in this, his first (and hopefully only), case at the Supreme Court. He was informed by the Clerk's office last week that he could file a supplemental brief to the Solicitor General's waiver. The purpose of this filing is to provide additional information to the Court about the actions he has taken to persuade the President, the Secretary of Energy, the Chairman of the Merit Systems Protection Board, and/or the Solicitor General, if the Court invites a response to his petition, to file a response of acquiescence.

On April 8, 2010, shortly after his petition was docketed, Max Smith, the Shop Steward of the federal employee union – Office and Professional Employees International Union (OPIEU), to which Mr. Carson belongs – wrote the Secretary of Energy requesting he support the Solicitor General filing a response of acquiescence, App. 1-3. Mr. Carson, on April 11, 2010, wrote to the Solicitor General with a similar request, App. 4-6. On April 14, the Solicitor General responded to Mr. Carson's letter and petition with a letter, App. 7, notifying him of her decision to file a waiver.

On April 26, 2010, Mr. Carson wrote to the President, requesting he direct the Solicitor General to withdraw the waiver and file a response in acquiescence, for a variety of reasons, App. 9-19. The National Whistleblower Center, a major whistleblower advocacy group, has started an "action alert" campaign, intended to persuade the President and

Solicitor General to file a response in acquiescence, if this Court invites a response.[1]

Mr. Carson is named for a NYC fireman, his grandfather, who served at Ladder Co. 42 on Prospect Avenue in the Bronx for 20 years. By his desk he keeps the picture and NY Times profile of Fireman Peter Bielfeld, the only casualty from Ladder Co. 42 on 9/11. Fireman Bielfeld was home on disability leave on 9/11. He saw the attack and self-deployed to the World Trade Center, where he died.

No one would have criticized him had he not shown up on 9/11. But he would have known that he "looked the other way," instead of doing his professional duty to protect others, despite the obvious risks. Similarly, no one would have criticized Mr. Carson if he had not "blown whistles" about the serious workplace health and safety issues he uncovered, after they were suppressed by his management. But he would have known he "looked the other way," instead of doing his professional duty to protect others, despite the risks.

---

[1] See http://capwiz.com/whistleblowers/home/

Mr. Carson earnestly hopes this Court decides his petition warrants a response from the Solicitor General.

Respectfully submitted,

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831
Pro Se

Office and Professional Employees
International Union, A.F.L.-C.I.O. Local 2001

Phillip Pope, President

411 S. Gay Street, Suite D (865) 637-6547 (Phone)
Knoxville, TN 37902 (865) 637-6548 (Fax)

April 8, 2010

The Honorable Dr. Steven Chu
Secretary of the U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

RE: **Request for Support in Mr. Joe Carson's Supreme Court Case**

Dear Secretary Chu:

The Office and Professional Employees International Union, AFL-CIO, Local 2001 (OPEIU), represents the Department of Energy's (DOE's) bargaining unit employees at the Oak Ridge Office and the Office of Scientific and Technical Information. OPEIU supports and is asking that DOE request the Solicitor General to file a brief supporting Mr. Joseph P. Carson in his pending petition to the Supreme Court of the United States.

There are several reasons OPEIU supports the actions requested in Mr. Carson's brief, including:

- Currently, the lack of case law by the Federal Circuit relating to the 1994 amendment to the Whistleblower Protection Act of 1989, which added "any other significant change in

duties, responsibilities, or working conditions" to be included as "personnel actions," leaves a chasm for biased interpretation. OPEIU believes this should be corrected to provide specificity to the meaning and intent of the 1994 amendment.

- The Supreme Court decision in *Burlington v. White*, 126 S.Ct. 2405 (2006) is likely relevant to determining when an agency action becomes a "personnel action" by creating "any other significant change in duties, responsibilities, or working conditions." Albeit decided by the Supreme Court, this case was brought under the Title VII umbrella. Since this decision, it has been argued that this case is not specifically applicable to Title V. OPEIU believes this decision should also be applicable to all federal employees.

- The U.S. Office of Special Counsel, the primary bulwark to protect federal employees from Prohibited Personnel Practices (PPP's), has apparently been using the absence of case law at the Federal Circuit to presumptively determine that it does not have jurisdiction for PPP complaints alleging this type of personnel action, i.e., that whatever agency action is alleged, said action did not create "any other significant change in duties, responsibilities, or working conditions."

- Such precedent would aid DOE's compliance, and specifically your statutory duty to "prevent PPP's."

- Such precedent could be cited by arbiters, regardless of whose favor the arbitration is decided, as an integral part of the negotiated grievance process.

As Secretarial policy has declared for many years, DOE employees must be adequately protected from reprisal for the overall good of DOE's missions. After reviewing Mr. Carson's Petition for a Writ of Certiorari, OPEIU believes that his petition to the Supreme Court is intended to provide definition and clarity to a nebulous area of the law. OPEIU further believes that the resolution of this matter will work to the benefit of both federal agencies and unions across the country. OPEIU therefore respectfully requests that DOE join in support of Mr. Carson's petition by requesting the Solicitor General to file a brief 'in acquiescence.'

Sincerely,

/s/ R. Max Smith
R. Max Smith, P.E.
Shop Chair
Office and Professional Employees
International Union, AFL-CIO,
Local 2001
Post Office Box 2001; Mail Stop EM-91
Oak Ridge, Tennessee 37831
E-mail: SmithRM@oro.doe.gov

April 11, 2010

Honorable Elena Kagan
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Via: fax, email, and overnight delivery (on April 12, 2010)

Re: *Carson v. Merit Systems Protection Board*, No. 09-1207, docketed at Supreme Court on April 6, 2010; request for an "acquiescence"

Dear Solicitor General Kagan,

For reasons stated in my petition of writ of certiorari as well as in the accompanying letters and documents, I respectfully request your office file an "acquiescence" agreeing that the matter merits review by the U.S. Supreme Court.

President Obama, as both a candidate and as President, has supported increased protection for federal whistleblowers. This is a jurisdictional case – in its response to my individual right of action (IRA) whistleblower appeal to the Merit Systems Protection Board (MSPB), the Department of Energy (DOE) complied with MSPB regulation by agreeing that the involved agency actions occurred. (I have also enclosed the "corresponding brief on CD-ROM" which I created per Fed. Cir. R. 32(e), it includes the joint

appendix, the relevant pages from the agency's response to MSPB are cited in my brief to the Supreme Court).

It is a legal fact that I am a whistleblower who suffered various forms of unlawful reprisal. The question is whether the agency actions cited in this appeal are "personnel actions" for creating "any other significant change in duties, responsibilities, or working conditions."

Determining whether an agency action becomes such a personnel action is ***still*** unreviewed at the Federal Circuit, 16 years after this "catch-all" category of personnel action was created. Additionally, there is no precedent at the MSPB whether the Supreme Court precedent in *Burlington v. White*, 126 S.Ct 2405 (2006) is relevant this determination.

I hope you will agree the Administration's repeatedly stated objectives to improve federal whistleblower protection can be advanced by this case, if the Supreme Court remands it to the Federal Circuit with appropriate instructions. I also hope a significant number of stakeholders to a trustworthy federal civil service will contact your office and/or the White House in support of this request. I understand that your office only has until April 26, 2010 to file an acquiescence, per Supreme Court Rule 12.6.

Respectfully,

Joseph P. Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

copy:

Norm Eisen, President Obama's Special Counsel for Ethics and Government Reform

Attachments:

My April 3, 2010 letter to DOE Secretary Chu

My April 6, 2010 letter to MSPB Chairman Grundmann

OPEIU (a federal employee union) April 8, 2010 letter to DOE Secretary Chu

Then-Senator Obama's May 2007 response to survey on federal whistleblower protection

Corresponding brief on CD-ROM for the underlying case at Federal Circuit, *Carson v. MSPB*, docket no. 2007-3134

[Seal] **U.S. Department of Justice**
Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

April 14, 2010

Mr. Joseph P. Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934

Re: *Joseph P. Carson v. Merit Systems Protection Board, S.Ct. No. 09-1207*

Dear Mr. Carson:

This is in response to your letter of April 11, 2010, requesting that the United States acquiescence in the above-captioned case.

After careful review of the petition our office has decided the United States will not file a response. If the Court disagrees, and wishes to hear our views on the merits of your petition, it will ask for a response from the government, which will, of course, be provided.

Sincerely,

/s/ Elena Kagan [as]
Elena Kagan
Solicitor General

Attachment

IN THE SUPREME COURT
OF THE UNITED STATES

CARSON, JOSEPH P.
Petitioner

vs.

MERIT SYSTEMS PROTECTION BOARD

No. 09-1207

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

ELENA KAGAN
Solicitor General
Counsel of Record

April 14, 2010

cc: JOSEPH P. CARSON
10953 TWIN HARBOUR DRIVE
KNOXVILLE, TN 37934

April 26, 2010

President Barack Hussein Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Via: Norm Eisen, White House Special Counsel for Ethics and Government Reform

Subject: Dreams for my Profession of Engineering and the Audacity of Hope

Dear President Obama,

By dint of 18 years of sacrifice, risk, loss and tremendous exertion to uphold, defend and advance my profession of engineering, its code of ethics, and the public health and safety (together with the "merit system principles" of the federal civil service) as a licensed professional engineer (PE) employed by the U.S. Department of Energy as nuclear safety engineer, I am now an influential member of mankind largest and most global profession of engineering whose 20 million degreed members worldwide collectively held civilization and much of the natural environment in the hands. I have also become an influential member of the federal civil service, whose 2 million members have vital responsibilities for America's safety, security and welfare.

What did I do? I "blew whistles," about serious workplace safety and health issues in the Department of Energy (DOE), after they were suppressed by my management, per my positive legal and professional duty as a PE. Then I defended, vigorously, my

"right" to do my duty to protect others, via rule of law. This now has me, pro se, in front of the Supreme Court, in *Carson v. Merit Systems Protection Board*, docket no. 09-1207.

Why? Ultimately because my Christian worldview informs me that mankind is God's "creation-caring for creature" on planet earth, with stewardship responsibilities for the planet and its inhabitants, particularly other men. It also informs me that "suffering for righteousness' sake" is not necessarily to be shunned, that it can be a privilege of a sort (while it remains suffering nonetheless). This is because it results from a moral choice, while most suffering comes unbidden, and because there is a possibility of tangible moral and embodied good coming from such suffering. Suffering for righteousness' sake is just part of moral fabric of universe, a necessary part of confronting and controlling evil, particularly institutional evil. But it both requires – and witnesses to – "an audacity for hope."

Please let me be clear – the most "unfair" thing about my life is how "unfairly fair" life has been to me, compared to so many others – now and in history. I am named for a NYC fireman, my grandfather; I watched the erection of the WTC when walking to the subway to go to High School, Brooklyn Prep. I had a scholarship to Brooklyn Prep, was offered a number of academic and athletic scholarships to college, was hand-selected by Admiral Rickover to be a nuclear officer, served on nuclear submarines, made a lot of money as a contract engineer at several commercial

nuclear power plants in 1980's, have been married 25 years, have 3 loving and capable children, and a sustaining faith.

But I also have a picture over my desk of Fireman Peter Bielfeld, the only casualty from Ladder Co. 42 on 9/11. My grandfather served at Ladder Co. 42 for 20 years, it is on Prospect Avenue in the Bronx. On 9/11, Fireman Bielfeld was home on disability leave. Despite that, he self-deployed to the WTC, where he died. He made a choice to do his duty when no one would have said anything had he not shown up. Please test my claims – that I made a choice to do my duty – despite incurring significant personal and professional costs – when no one would have said anything had I "looked the other way."

Requested Direction to the Solicitor General, Per Your Campaign Pledge to Support Federal Whistleblowers

Shortly after my petition for certiorari to the Supreme Court in *Carson v. Merit Systems Protection Board*, no. 09-1207, was docketed on April 6, 2010, I made a request to Mr. Eisen, the Secretary of Energy, the Chair of the Merit Systems Protection Board, and the Solicitor General, that the Solicitor General file a response in acquiescence. If this happened, the statistical chances of the Supreme Court granting my petition would rise from about 1 in 500 to over 70%. On April 14, the Solicitor General filed a notice of waiver with the Supreme Court, meaning it will not

file a response, unless directed by the Supreme Court. I understand the Solicitor General files such waivers about 85% of the time.

I respectfully request you to direct the Solicitor General to withdraw the waiver and file a response in acquiescence. It has until May 6, 2010 to do so. I seek the Supreme Court to vacate the decision and remand the case to the US Court of Appeals for the Federal Circuit with instructions to create precedent about a 1994 amendment to the 1989 Federal Whistleblower Protection Act that was intended to significantly strengthen the protection available to federal whistleblowers. Because there is no precedent at the Federal Circuit – 16 years later – it is not doing so. Your doing this would be an unprecedented step in support of federal whistleblowers and an important step to restoring trust in America's federal civil service and federal agencies.

In attachment one to this letter are several related documents.

Substantiating or dispelling my claims of 31 years of lawbreaking at U.S. Office of Special Counsel (OSC) and U.S. Merit Systems Protection Board (MSPB)

President Obama, our Country – as civilization as a whole – faces unprecedented challenges. It must have a trustworthy federal civil service, which requires you and your agency heads ensure that federal employees are able to do their duty, ethically and competently,

per the "merit system principles," while being adequately protected from "prohibited personnel practices (PPP's), particularly reprisal (note: PPP's are, by and large, agency violations of the merit system principles").

You cannot say that, neither can your agency heads – none can apparently demonstrate compliance with their nondiscretionary duty to adequately protect their employees from PPP's – i.e. "prevent PPP's," per 5 U.S.C. §2302(c). This requirement was created in 1979 per the Civil Service Reform Act of 1978. How can my claims of 31 years of non-compliance with this vital duty – and the harm it has caused America – be considered "good news"? Well, if I am correct, then a previously unidentified significant factor for much of what has befallen America since 1979 has been identified – and it can be readily fixed. That is **good news** (at least to this engineer).

In attachment two to this letter are several related documents.

Engineering Ethics, Nuclear Terrorism, and my Profession's Role in Darfur/Sudan

I have become a recognized expert in engineering ethics. There are significant deficiencies in the scope and implementation of engineering ethics. As one specific, quite relevant to the recent summit you convened on nuclear security, my profession has yet to condemn terrorist engineers – and foiling an ingenious and

persistent terrorist nuclear engineer – was the goal of the summit.

The engineering profession's condemnation of terrorist engineers is not a panacea, but it should have happened shortly after 9/11. Bin Laden has been condemned by his family, his religion, and his Country – so why not his profession too? A number of leaders of major engineering professional societies have told me that they "lead from behind" and that if more rank and file members of those societies told them to condemn terrorist engineers, it would happen. I can assure you that "more" is not "many more," from my serving in a number of volunteer leadership positions in several major engineering societies over the years, it would probably only take 10 members of a 100,000 member professional engineering society, working together, to persuade the society's board to condemn terrorist engineers. And once one society did so, others would follow.

The conflicts in Darfur and Sudan are literally fueled by Sudanese oil. Therefore my profession is playing an enabling role in genocide, mass rape, and wanton destruction, contrary to its code of ethics and values. It should be playing a much more positive role to bringing peace, democratic rule of law based in human rights, and sustainable development to Darfur and Sudan.

President Obama, you have forgotten more than I will ever know about creating a vision for the common good and advancing it. However, should you take the

unprecedented action (at least for federal whistleblower appeals to the Supreme Court) of directing the Solicitor General to file a response in acquiescence, it will result in the federal whistleblower community embracing my cause – to expose and stop 31 years of lawbreaking at OSC and MSPB – and for leaders of the engineering profession to address my concerns about long-standing, significant deficiencies in the scope and implementation of engineering ethics.

As one result, an "A-lister" celebrity should be readily recruited to headline a short video to promote the "engineer's petition for Darfur" <www.engineersfor darfur.org>, by which engineers of all faiths and no faith, worldwide, can tell leaders of their profession to do and say more responsible things about Darfur. The petition is an unprecedented effort to advance my profession's code of ethics in unprecedented ways – and it will work (actually, it must work for my profession to play its necessary role in advancing a desirable future for mankind).

In an attachment to this letter are several related documents.

Vols4STEM and National Lab Day, Part of your "Educate to Innovate" Initiative

Since 2004 my wife, Karen, has served on the Knox County (TN) Board of Education – 56,000 students, 380 million dollars/year. She served as Board Chair for two years, during which the Board bought out the contract of the Superintendent and conducted its first

nation-wide search for a replacement. She played an essential role in the selection of Dr. Jim McIntyre as the new Superintendent in the Spring of 2008. Several weeks ago, Dr. McIntyre presented Tennessee's Race to the Top application to the Department of Education, with the Tennessee Governor, Chairs of its House and Senate Education Committees, and Commissioner of Education sitting behind him. Tennessee was awarded 500 million dollars, as you know.

In part because of Karen, in late 2006 I sought and obtained a mandate from the Knoxville chapter of the Tennessee Society of Professional Engineers (TSPE) to lead the creation of what is now Vols4STEM <www.Vols4STEM.org>. It is an unprecedented effort to facilitate the voluntary collaboration of our area's Science, Technology, Engineering and Math (STEM) professional community, STEM employers, and STEM educators to improve K-12 STEM education and workforce development, primarily by getting more STEM professionals involved, as volunteers, in STEM outreach activities to area youth. We hope to make it a national model – by which the engineering profession and its members can advance their profession's code of ethics and service to society. The STEM educators have stressed that their students would benefit by having engineers share how they honor and advance engineering ethics – including by volunteering for such educational outreach.

We are building on existing community social capital – local sections of professional societies, PTA's/PTSO's, faith communities, boys scouts, girl scouts, faith

communities and their youth service ministries, chambers of commerce, etc – in pulling this together. Recently, we placed over 500 Knox County STEM teachers with area employers as part of their in-service day, where they had a chance to ask "how is what we teach relevant to what you do?" and start creating personal connections between area employers and educators.

Because this area is a Department of Energy (DOE) host community, it has a high concentration of STEM professionals, making this an ideal area for an effort as Vols4STEM. For whatever reasons, DOE has not, to this point, given Vols4STEM a "public pat on the back." Its doing so would speed, significantly, the growth of the Vols4STEM network. I am not complaining, but there seems to be a disjoint between your "Educate to Innovate" initiative and what federal agencies with science and technology missions and field facilities perceive they can do to help foster the its objectives in their host communities via an inclusive, non-partisan, volunteer resource as Vols4 STEM.

We hope the upcoming National Lab Day <www.NationalLabDay.org> provides an opportunity to showcase what we have accomplished so far with Vols4STEM, because we designed it to work anywhere there is a significant STEM professional community.

In attachment four to this letter are several related documents.

Conclusion:

If you direct the Solicitor General to withdraw the waiver and file a response in acquiescence in my Supreme Court case, it will result in perceptible positive change – for federal whistleblowers, for the federal civil service, and the profession of engineering.

If you direct the Office of Legal Counsel to issue opinions of the contested areas of OSC and MSPB law and my concerns are substantiated, it will be very **good news for America** – a contributing cause to much that has gone wrong since 1979 has been identified and can be readily fixed.

If DOE is asked why it cannot give a public endorsement to efforts as Vols4STEM and, as a result, it is determined that it lawfully can, then the Vols4 STEM network will grow more quickly and, we hope, become a widely copied model in many communities around the Country, particularly host communities of federal facilities with STEM-related missions, advancing the objectives of National Lab Day and your "Educate to Innovate" initiative.

Thank you for whatever consideration you or members of your administration deem these requests to merit.

Respectfully,

Joe Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831 <jpcarson@tds.net>

copy:

Secretary of Energy
Chairman of MSPB
Solicitor General of United States
Other stakeholders to STEM education, engineering ethics, and Darfur/Sudan

(3)

No. 09-1207

Supreme Court, U.S.
FILED
MAY 5 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICI CURIAE DOROTHY PRITCHETT ET AL. SUPPORTING PETITION FOR WRIT OF CERTIORARI

DAVID B. NOLAN, ESQ.
8310 Wagon Wheel Road
Alexandria, VA 22309-2175
703-780-1864
DC Bar No. 379804
dbnesq1@aol.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND SOURCE OF THEIR AUTHORITY TO FILE	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	9
THERE IS AN OVERLAP BETWEEN PPP'S AND EEO VIOLATIONS	9
FEDERAL CIRCUIT PRECEDENT WILL FORCE THE OFFICE OF SPECIAL COUNSEL TO PROTECT FEDERAL EMPLOYEES FROM RELATED PPP'S	9
THE PETITION IS CONSISTENT WITH PRESIDENT OBAMA'S POLICY FOR PROTECTING FEDERAL EMPLOYEES FROM REPRISAL	10
THE RESULTS OF THIS CASE COULD INFLUENCE CONGRESSIONAL REAUTHORIZATION OF OSC AND MSPB	11
THE RESULTS OF THIS CASE COULD INFLUENCE PENDING LEGISLATION TO REFORM THE FEDERAL WHISTLEBLOWER PROTECTION ACT	11
THERE IS NO STATUTE OF LIMITATIONS FOR PPP'S AND *RES JUDICATA* DOES NOT APPLY TO OSC'S EFFORTS TO SEEK REMEDY FOR VICTIMS OF PPP'S	11

TABLE OF CONTENTS – Continued

Page

THIS SITUATION ILLUSTRATES SIGNIFICANT DEFICIENCIES IN SCOPE AND IMPLEMENTATION FOR LEGAL ETHICS FOR GOVERNMENT ATTORNEYS WITH RESPONSIBILITIES TO IMPLEMENT SPECIFIC LAWS 11

THE POLITICIZATION OF THE DEPARTMENT OF JUSTICE DURING THE PREVIOUS ADMINISTRATION IS INDEFENSIBLE 13

FEDERAL EMPLOYEES MUST BE ADEQUATELY PROTECTED FROM PPP'S 14

NEITHER THE PRESIDENT, CONGRESS, NOR AGENCY HEADS KNOW WHETHER FEDERAL EMPLOYEES ARE ADEQUATELY PROTECTED FROM PPP'S 14

OSC IS A SCANDALOUS FAILURE AND THE POSITION OF SPECIAL COUNSEL HAS BEEN VACANT FOR 20 MONTHS 14

THERE IS SIGNIFICANT AND GROWING INTEREST IN THIS CASE 15

IF THE SUPREME COURT GRANTS THE PETITION IT COULD RESULT IN HUNDREDS OF VICTIMS OF PPP'S OBTAINING RELIEF 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Burlington North. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006) 3, 7, 9

Weber v. Dept. of Army, 209 F.3d 756 (D.C. Cir. 2000) 10

STATUTES

5 U.S.C. §1103(a)(5) 14

5 U.S.C. §1104(b)(2) 14

5 U.S.C. §1201 ..... 2, 3

5 U.S.C. §1204(a)(3) 4, 16

5 U.S.C. §1211 12

5 U.S.C. §1214(e) 4, 5, 16

5 U.S.C. §1214(g) 16

5 U.S.C. §1218 5

5 U.S.C. §1219(a)(3) 5

5 U.S.C. §2301(b) 2

5 U.S.C. §2302(a)(2)(A)(xi) 3

5 U.S.C. §2302(b) 2

5 U.S.C. §2302(b)(1) 9

5 U.S.C. §2302(c) 2, 4, 15, 16

TABLE OF AUTHORITIES – Continued

Page

Pub. L. 101-12, Federal Whistleblower Protection Act of 1989 (WPA) 2, 3

Pub. L. 103-424, U.S. Office of Special Counsel Reauthorization Act 3

REGULATIONS

5 C.F.R. §1810.1 ..... 7, 9

28 C.F.R. §0.25 15

OTHER

American Bar Association (ABA) "Model Rules of Professional Conduct" 11

IDENTITY OF PARTIES TO AMICI CURIAE BRIEF AND THEIR INTEREST IN THE CASE

Parties to this amici curiae brief are individuals or organizations who are aligned, for a variety of reasons – centering on patriotism – with the objectives of OSC Watch, an unincorporated "ad hoc" group with three objectives:[1, 2]

> 1) Expose 31 years of non-compliance by the U.S. Office of Special Counsel (OSC), U.S. Merit Systems Protection Board (MSPB) and agency heads with essential aspects of their respective nondiscretionary statutory duties to ensure that federal employees are adequately protected from "prohibited personnel practices (PPP's)," particularly the whistleblower reprisal type PPP.

---

[1] Per Supreme Court rule 37(2)(a), the Solicitor General was timely notified of the intent to file this amici curiae brief and consented, in writing, to it. Joseph Carson, PE, is the chair of the OSC Watch Steering Committee and David Nolan is its legal advisor. Mr. Carson contributed financially to the printing of this brief. Mr. Nolan is actively seeking the nomination of President Obama to be Special Counsel, head of OSC, a position which has been vacant since October 2008. His campaign blog is www.NolanforOSC.com.

[2] Walter Bradley, Sandalio (Sandy) Gonzalez, Alfonso Diaz del Castillo, Heriberto Rivera, Janet L. Westbrook, Jennifer Anderson, David Shaller, Janet Parker, Stephen Buckley, John Gard, Larry Fisher, Joseph Palazzolo, Martin Salazar, Linda Lewis, Lenora Portillo, Anil Parikh, Ivan (John) Petric, Mary Elizabeth Bullock, Bogdan Dzakovic, John Carson, T.J. Carson, Gabe Bruno, John Jay, Carol Czarkowski, Jim Salmon, David Wetzell and Calvin Weber.

2) Stop it, and

3) Obtain some measure of justice, no matter how limited or delayed, for the direct victims of this situation – the thousands of loyal, patriotic federal employees who, since 1979, put professional duty before self-interest and were not adequately protected from PPP's.

The primary purpose of the Civil Service Reform Act of 1978 was to create a statutory framework by which federal employees can perform their duties ethically and competently, per the merit system principles – the core values of the federal civil service[3] – while being adequately protected from PPP's.[4] By harming the merit system principles, PPP's harm federal governance, the public health, safety, and welfare, the common defense, citizens' trust in the federal government and, ultimately, rule of law in America.[5] OSC has a statutory mandate to "act in the interests" of federal employees who seek its protection from PPP's.[6] Agency heads, OSC, and MSPB

---

[3] The 9 merit system principles are codified at 5 U.S.C. §2301(b).

[4] The 12 types of PPP's are codified at 5 U.S.C. §2302(b).

[5] For example, App. 5-17 is a memo from former Attorney General Mukasey to Department of Justice employees that summarizes the merit system principles and PPP's, it was written in response to several reports which identified numerous PPP's in DOJ during the Bush Administration.

[6] Section 2, "Whistleblower Protection; Congressional Statement of Findings and Purpose," of Pub. L. 101-12, the Federal Whistleblower Protection Act of 1989, is in the appendix of 5

(Continued on following page)

share the statutory mandate that "the protection of individuals who are the subject of PPP's remains the paramount consideration."[7]

Parties to this amici curiae brief desire that case law be established, over 15 years after the law was passed, at the Federal Circuit regarding when an agency action becomes a "personnel action" for creating "any other significant change in duties, responsibilities or working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi).[8] They also desire precedent establishing that *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) applies to making this determination. They desire that OSC, finally – after over 15 years – start complying with its non-discretionary statutory duty to protect federal employees who allege PPP's involving this type of personnel action.

The parties to this amici curiae brief salute Joseph Carson, PE, for his loyal service to his profession of engineering and the federal civil service, despite the many years of suffering, risk, and loss it has exacted from him and his family as well as for his tremendous exertions, as a licensed professional engineer (PE) employed by the Department of Energy as a

---

U.S.C. §1201. Section 2(b)(2)(B) mandates OSC to "act in the interests" of federal employees who seek its protection.

[7] Pub. L. 101-12, section 2(b)(2)(C), also found in the appendix to §1201.

[8] Pub. L. 103-424, U.S. Office of Special Counsel Reauthorization Act.

nuclear safety engineer, to defend, uphold and advance his profession of engineering, its code of ethics, the merit system principles, and the public health and safety.

This case should be very ***good news*** for America -- Joseph Carson, PE, has uncovered a previously unidentified significant contributing factor for much of which has befallen America since 1979 and besets it now – a near complete breakdown in the nondiscretionary statutory framework to protect, adequately, federal employees from PPP's – and it is something that can be readily fixed.

This breakdown centers on OSC's 31-year long interpretation of (what is now) 5 U.S.C. §1214(e), that its reporting requirements do not apply to OSC's determinations about PPP's and other violations within its enforcement jurisdiction and MSPB's 31-year long interpretation of (what is now) 5 U.S.C. §1204(a)(3), that its "special studies" do not ever need to consider OSC's interpretation of and compliance with its nondiscretionary statutory duties to protect federal employees from PPP's nor agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's," per 5 U.S.C. §2302(c). As a predictable result, agency heads are unable to comply with this vital duty, because OSC's interpretation of §1214(e) and MSPB's interpretation of §1204(a)(3) keep them "in the dark" as to whether their employees are adequately protected from PPP's.

All parties to this brief desire "justice for all" where "all" are the 25,000 or more federal employees who have filed about 50,000 PPP complaints with OSC since 1979, alleging about 100,000 specific PPP's.[9] Almost all of these individuals did not obtain the tangible nondiscretionary statutory protection OSC owed them – a written determination whether "there is reasonable grounds/cause to believe" the alleged PPP occurred and, if positive, an OSC report of that determination to the involved agency head, per 5 U.S.C. §1214(e).

By §1214(e), the involved agency head is required to certify his review of both the OSC report and the agency's response containing the corrective actions and a schedule to implement them. Both the OSC report and the agency-head certified response become permanent, publicly available records per §1219(a)(3). Because OSC, at its creation in 1979, contrary to the plain meaning of the law and its legislative history, renounced its duties to report its determinations of PPP's per §1214(e), it has not issued a single §1214(e) report in 31 years.[10] Because MSPB, at its creation in 1979, renounced its duty to conduct "special studies" of OSC's compliance with its nondiscretionary statutory duty to protect federal employees from

---

[9] Based on review of OSC's Annual Reports to Congress, per 5 U.S.C. §1218, since 1979.

[10] As verified by review of OSC's publicly available records, review of all its Annual Reports to Congress, and via OSC's responses to FOIA requests for such records.

PPP's, this situation has gone uncorrected for 31 years.[11]

Additionally, had OSC and MSPB complied with their duties, agency heads would have been able to comply with their duty to "prevent PPP's" for the past 31 years by correcting the deficient workplace cultures in their agencies that permit, if not reward, PPP's, thereby preventing many, if not most, of the 100,000 PPP's alleged to OSC since 1979.

A federal workplace that allows any kind of PPP, more likely allows every kind of PPP – together with other violations of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority, and/or substantial and specific danger to public health or safety. OSC is supposed to be the "immune system" of the federal civil service, its noncompliance with its nondiscretionary statutory duty to protect federal employees from PPP's has allowed much corruption and dysfunction to take root and flourish in many federal workplaces, resulting 31 years later, in a much diminished and more threatened America.

More specifically, parties to this amici curiae brief contend that if OSC, MSPB and agency heads

---

[11] See App. 2-4 for current MSPB Chairman Susan Grundmann's October 2009 Senate confirmation hearing testimony which, near its end, tacitly admits MSPB has not performed the requisite special studies to make such a report. Dave Nolan, the counsel for this brief, brought this situation to Ms. Grundmann's attention during her confirmation process.

had scrupulously complied with their respective non-discretionary statutory duties to ensure federal employees were adequately protected from PPP's, it is reasonable that 9/11 could have been prevented, along with loss of space shuttles, VA health care scandals, SEC's repeated failure to catch Bernard Madoff, and many other instances of federal agency malfeasance or incompetence which has so eroded the public trust in instruments of governance since 1979.

SUMMARY OF ARGUMENT

There is often overlap between PPP's and EEO violations as explicitly stated in OSC regulations at 5 C.F.R. §1810.1. Therefore, *Burlington* is relevant to determining whether an agency's actions cause "any other significant change in duties, responsibilities, or working conditions." If the Federal Circuit establishes precedent consistent with the relevant legislative history and *Burlington*, it will force OSC to start complying with its nondiscretionary duties to protect federal employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively but retroactively to 1994. President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal. Congressional re-authorization of OSC and MSPB are overdue.

The results of this case may influence these Congressional deliberations. Legislation to reform the Federal Whistleblower Protection Act is pending in Congress.

The results of this case may influence these Congressional deliberations. There is no statute of limitations for PPP allegations and OSC has broad, even if largely untested, power to protect federal employees from PPP's, including re-opening previously closed PPP investigations.

OSC can apparently seek corrective action for victims of PPP's, even if these victims failed to obtain remedy at MSPB. *Res judicata* does not apply.

This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of interest to this Court. The putative politicization of U.S. Attorneys in the Department of Justice under President Bush was investigated by former Special Counsel Scott Bloch. Such alleged Hatch Act violations and PPP's threatened the rule of law. Are federal employees adequately protected from PPP's?

Executive branch employees must be adequately protected from PPP's. This includes the intelligence agencies and the White House. The recent conviction of former Special Counsel Scott Bloch brings additional shame to the Office of Special Counsel. There is a 20-month long vacancy for the position of Special Counsel. This Court's actions in this case may

influence the nomination and Senate confirmation process for this vital position.

There is significant and growing interest in the *Carson* case, particularly whether the Obama Administration will file a response of acquiescence, if this Court invites a response. If the Solicitor General files a response of acquiescence, there is a high probability, based on Court statistics, that this Court will grant Mr. Carson's petition for writ of certiorari.

ARGUMENT

1) There is often overlap between PPP's and EEO violations as explicitly stated in OSC regulations at 5 C.F.R. §1810.1. Therefore, *Burlington* is relevant to determining whether an agency's actions cause "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. §2302(b)(1) is the "EEO-type" PPP and includes the types of employment discrimination prohibited by EEO law. OSC is authorized to investigate allegations of EEO-type PPP's but normally defers to the EEOC. It makes no sense that *Burlington* would be relevant to an EEOC investigation, but not to an OSC investigation, into the identical allegation.

2) If the Federal Circuit establishes precedent consistent with the relevant legislative history and *Burlington*, it will force OSC to start complying with its nondiscretionary duties to protect federal employees from PPP's involving "any other significant

change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively, but retroactively to 1994. OSC uses the lack of case law at the Federal Circuit as justification for its ostensible position that absent contrary Federal Circuit precedent, OSC will presume no agency action creates "any significant change in duties, responsibilities, or working conditions."[12] Of course, OSC's posture largely precludes the Federal Circuit's establishing relevant precedent and, over 15 years since this new category of personnel action was created, there is no precedent at the Federal Circuit because OSC apparently prefers it that way.

3) President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal as evidenced by his campaign pledge to protect federal whistleblowers and by the public statements of the White House Special Counsel for Ethics and Government Reform Norm Eisen about whistleblower protection.[13] [14]

---

[12] While OSC's negative determinations "on the merits" of a PPP complaint are not subject to explicit Court review, its negative jurisdictional determinations are subject to district court review and correction via a writ of mandamus, see *Weber v. United States*, 209 F.3d 756, 758 (D.C. Cir. 2000).

[13] See App. 1 for then-candidate Obama's pledges to federal whistleblowers.

[14] See App. 20-22 for a related story about the Obama Administration's unprecedented openness to federal whistleblower advocates.

4) Congressional re-authorization of OSC and MSPB are overdue. The results of this case may influence Congressional deliberations in reauthorizing them.[15]

5) Legislation to reform the Federal Whistleblower Protection Act is pending in Congress. The results of this case may influence these Congressional deliberations.[16]

6) There is no statute of limitations for PPP allegations. OSC has broad, even if largely untested, power to protect federal employees from PPP's, including re-opening previously closed PPP investigations. OSC can apparently seek corrective action for victims of PPP's, even if they failed to obtain remedy at MSPB. *Res judicata* does not apply because OSC is a different party and would be seeking corrective action by a different section of law.

7) This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of interest to this Court. Specifically, the America Bar Association's "Model Rules of Professional Conduct" which have been adopted in whole or significant part by the large majority of attorney licensing authorities, does not

---

[15] In the 110th Congress, H.R.3551 and S.2057, "Federal Merit System Reauthorization Act of 2007."

[16] In the current Congress, H.R.1507 and S.372 are both approved out of committee.

address the professional obligations of a "case-worker" attorney at OSC – the OSC attorney responsible to ensure that OSC scrupulously complies with its nondiscretionary statutory duties to protect federal employees from PPP's in his/her assigned cases. Over half of OSC's 115 employees are attorneys, most are case-worker attorneys, responsible for the implementation of OSC's nondiscretionary statutory duties to protect federal employees from PPP's in their respectively assigned cases.

By currently applicable legal ethics, the client of an OSC case-worker attorney is OSC. For his/her government employer, he/she must hold the interests of OSC paramount, even if inconsistent with the best interests of the complainant. The case-worker attorney at OSC is prohibited from "blowing whistles" about any OSC non-compliance with its nondiscretionary statutory duties to protect federal employees from PPP's.

Additionally, as per 5 U.S.C. §1211, the Special Counsel must be an attorney. By currently applicable legal ethics, a new Special Counsel, as an attorney, has an affirmative duty to defend how OSC, his/her client, complies with the nondiscretionary statutory duties to protect federal employees from PPP's.

A similar situation is present at MSPB where the members of the full board are usually attorneys. If a Board member disagrees with how MSPB has complied with a nondiscretionary statutory duty relevant to protecting federal employees from PPP's, can

he or she do anything but defend the past practice of the agency client absent new law or Federal Circuit decisions?

8) The putative politicization of the Department of Justice under President Bush includes Special Counsel Scott Bloch's investigation of alleged Hatch Act violations. The occurrence of PPP's in the Department of Justice (DOJ) harms the rule of law. The statutory mandate of the Office of Special Counsel is to protect federal employees from PPP's.

The four joint reports of the Department of Justice Office of Inspector General and Office of Professional Responsibility about these PPP's described how concerned employees "looked the other way" apparently, out of fear of agency reprisal – another type of PPP – if they responsibly voiced concerns.[17] However, these reports did not address whether DOJ employees were adequately protected by OSC, i.e., whether it was scrupulously complying with its nondiscretionary statutory duties to DOJ employees who alleged PPP's to it or whether MSPB was conducting the requisite "special studies" to determine and report whether DOJ employees are adequately protected from PPP's.

---

[17] These four reports were issued between June 2008 and January 2009 and are available at <www.justice.gov/opr/inv-rpts.htm>.

9) The MSPB has a nondiscretionary statutory duty to determine and report whether all federal employees in the Executive Branch, including intelligence agencies and the White House, are adequately protected from PPP's. Has it conducted and reported the requisite special studies, including concerning its own employees, over the last 31 years?[18] The Office of Personnel Management (OPM) is explicitly prohibited by 5 U.S.C. §1103(a)(5), from evaluating whether federal employees are adequately protected from PPP's when implementing its nondiscretionary statutory duty to review agency compliance with the merit system principles, per 5 U.S.C. §1104(b)(2). Moreover, neither the President nor Congress can confirm whether federal employees are adequately protected from PPP's. Have both OSC and MSPB complied with essential aspects of their nondiscretionary statutory duties to protect federal employees from PPP's since their creation in 1979? Congress has yet to re-authorize either entity.

10) The recent conviction of Special Counsel Scott Bloch for contempt of Congress has increased the opprobrium of the Office of Special Counsel. The position of Special Counsel has not been filled since October 2008. This Court's actions in the *Carson* case

---

[18] See App. 18-19 for MSPB's response to a FOIA request for such records.

may influence the nomination and Senate confirmation process for this vital position.[19] [20]

Just as at MSPB, OSC cannot even confirm that its own employees are adequately protected from PPP's after the termination of Special Counsel Scott Bloch. It is the nondiscretionary statutory duty of the Special Counsel to "prevent PPP's" in OSC, as per 5 U.S.C. §2302(c).

11) There is significant and growing interest in this case in the federal whistleblower community. The amici and other stakeholders in this case seek a trustworthy federal civil service. Their goal is to determine whether federal employees are adequately protected from PPP's.

If this Court invites a response from the Solicitor General, it will probably be a first for a federal whistleblower case. The *Carson* case generates much interest, particularly whether the Obama Administration will file a response of acquiescence.

The Obama Administration may direct, as per 28 C.F.R. §0.25, that the Office of Legal Counsel of the

---

[19] See App. 25-27 for Department of Justice press release of April 27, 2010 announcing guilty plea of Scott Bloch, former Special Counsel, to criminal contempt of Congress.

[20] See App. 23-24 for April 23, 2010 press release of National Whistleblower Center, calling for President Obama to immediately appoint a new Special Counsel.

Department of Justice issue opinions on the correctness of the 31-year long applications of 5 U.S.C. §§1204(a)(3), 1214(e), and 2302(c).

12) If the Solicitor General files a response of acquiescence, there is a high probability, based on Court statistics, that this Court will grant Mr. Carson's petition for writ of certiorari and remand the case to the Federal Circuit with instructions, to develop relevant case law that addresses the *Burlington* precedent. This could result in OSC complying with its nondiscretionary, statutory duty to protect federal employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" since 1994 by reporting them per §1214(e). This would allow an agency head to provide an adversely affected employee the "make whole remedy" of 5 U.S.C. §1214(g) and to advance Congressional intent and the merit system principles of the federal civil service.

CONCLUSION

For all the above reasons, the amici respectfully request this Court to invite a response from the Solicitor General to Mr. Carson's petition for writ of certiorari and, following that, to grant it.

Respectfully submitted,

DAVID B. NOLAN, ESQ.
8310 Wagon Wheel Road
Alexandria, VA 22309-2175
703-780-1864
DC Bar No. 379804

NATIONAL WHISTLEBLOWER CENTER
SURVEY OF THE
CANDIDATES FOR PRESIDENT – 2008 – [Senator Barack Obama]

	Yes	No	No Position
1. Do you support protecting government whistleblowers under the framework of H.R. 985 (which passed the House on March 14, 2007 by a vote of 331 to 94)?	☑	☐	☐
2. If elected, do you promise to advocate for the passage of a law which would give employees who are illegally terminated for blowing the whistle the same procedural and substantive protections as other wrongfully discharged employees under laws such as Title VII of the Civil Rights Act of 1964 (i.e. the law that prohibits discrimination on the basis of race or sex)?	☑	☐	☐
3. Under the Whistleblower Protection Act, the President appoints a Special Counsel whose major job is supposed to be the protection of federal employee whistleblowers. If elected President, are you committed to ensuring that the people appointed as the Special Counsel have expertise in whistleblower law and a firm commitment to protecting whistleblowers?	☑	☐	☐
4. Should employees who expose weaknesses in Homeland Security and/or the government's efforts to combat terrorism be fully protected under the whistleblower laws?	☑	☐	☐
5. Currently the federal environmental whistleblower protection laws have a 30 day statute of limitations. The Administrative Conference of the United States recommended that this filing period be enlarged to 180 days. If elected President, will you work to ensure that the statute of limitations applicable to environmental whistleblowers is enlarged to 180 days?	☑	☐	☐
6. If elected President, will you appoint a liason responsible for interacting with whistleblower advocates in order to better ensure that no employer illegally retaliates against employees who expose violations of law or waste, fraud and abuse?	☑	☐	☐

/s/ Danielle Gerry for Obama for America — 5/8/07
Signature of Candidate or Authorized Representative — Date

Please return to the National Whistleblower Center by May 8, 2007. The responses may be faxed to (202) 342-1904 or mailed to the Center at 3238 P Street, N.W. Washington, D.C. 2007 [sic].

App. 1

U.S. Senate Committee on Homeland Security and Governmental Affairs
Hearing on the Confirmation
On the Nomination of

Susan Tsui Grundmann
to be a Member and Chairman
of the U. S. Merit Systems Protection Board

Statement for the Record
October 20, 2009

Good afternoon Chairman Akaka, Ranking Member Voinovich, and members of the Committee. Thank you for this opportunity to appear before you today as you consider confirmation of my nomination to be a Member and the Chairman of the U. S. Merit Systems Protection Board. I am honored by the confidence that President Obama has placed in me by nominating me to this important position of public trust. I pledge that, if confirmed, I will discharge my responsibilities with integrity and in accordance with law, rule and regulation. I also want to thank you for your consistent efforts to ensure that the American public is well served by a civil service system that operates effectively and efficiently.

Mr. Chairman, for most of my practice, I have served as an advocate for Federal employees. During that time, I have also worked with Federal managers at all levels. I have worked in private practice and with the state courts. I have represented the interests of both management and line employees. I have become intimately familiar with the myriad of issues

that give rise to workplace disputes. My cumulative experience has provided me with a well grounded perspective of how the merit systems process works to ensure fairness in the Federal workplace. To serve as a Member and Chairman of the Merit Systems Protection Board is the opportunity to once again practice law in a neutral capacity. At the beginning of my legal career, I clerked for the judges of the Nineteenth Judicial Circuit of Virginia and welcome this opportunity to return that experience that laid the foundation for my commitment to public service as a neutral.

As Congress explores avenues for improving certain aspects of the civil service system, the Board's role as an independent and neutral arbiter of fairness and adherence to merit principles by Executive branch agencies remains vital to the effective and efficient operation of the Federal government. In FY 2009, the average case processing time for the initial decision was 83 days. The average case processing time on petitions for review to the full Board was 94 days. These statistics provide a solid basis for confidence in the MSPB appeals process. If confirmed, I will work to build upon the Board's impressive record for timely and balanced adjudication of challenges to adverse personnel actions and other matters under its jurisdiction.

It is crucial that both employees and managers perceive that they have equal access to the process, and that the system provides them with a fair opportunity to present their respective positions. I am

committed to ensure transparency of the process through a focus on issuing clear, understandable decisions, that provide "workable" guidelines for the parties and the Board's stakeholders. This objective is particularly important in a venue such as the MSPB where a large percentage of the appeals are filed by pro se appellants. If confirmed, I commit to these fundamental principles from the outset.

The Board's statutory studies function is also a significant part of the agency's responsibility. Study reports issued by the Merit Systems Protection Board are highly regarded in the Federal human resources management community and by the stakeholders of the Board. If confirmed, I plan to work with my fellow board members as well as the Office of Policy and Evaluation to continue this record of excellence. In particular, I pledge to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is adequately protected.

Mr. Chairman, at this time, I would be pleased to answer any questions that you or other members of the panel would like to ask of me.

[SEAL] **Office of the Attorney General**
Washington, D.C.

March 10, 2008

MEMORANDUM FOR DEPARTMENT OF JUSTICE POLITICAL APPOINTEES

FROM: THE ATTORNEY GENERAL

SUBJECT: *Merit System Principles and Prohibited Personnel Practices*

The framework for Federal human resources is built on integrity and merit. It is important for all of us to understand and follow the Merit System Principles in dealing with career employees. Our actions and decisions should be within the bounds set by the Merit System Principles and the Prohibited Personnel Practices, which are set forth in the attached briefing materials.

Beginning last summer, all new political appointees (Presidential Appointees with Senate Confirmation, Noncareer Senior Executive Service, and Schedule C appointees) have been briefed on Merit System Principles and Prohibited Personnel Practices as part of the orientation process. I am committed to ensuring that all serving political appointees are provided the same information. Therefore, please review the attached briefing materials and provide acknowledgement of your review and understanding of these hiring precepts to the Justice Management Division (JMD) no later than March 28, 2008. Please email your acknowledgements to: DOJ.Hiring-Training@usdoj.gov.

Our obligation to adhere to the highest standards of ethical and professional behavior will be enhanced by continued reinforcement of our human resource responsibilities.

Thank you.

Attachments

MERIT SYSTEM PRINCIPLES

Fact Sheet

What is the Merit System Protection Board (MSPB)? MSPB is directed by law to conduct special studies of the civil service and other Federal merit systems to determine whether these statutory mandates are being met, and to report to the Congress and the President on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

Where are the Merit System Principles found in regulation? 5 USC§ 2301(b):

(A) This section shall apply to –

(1) an Executive agency; and

(2) the Government Printing Office.

(B) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal workforce should be used efficiently and effectively.

(6) Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be –

(a) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(b) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences –

(a) a violation of any law, rule, or regulation, or

(b) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) In administering the provisions of this chapter –

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives; which is

consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

PROHIBITED PERSONNEL PRACTICES

Fact Sheet – Examples

What are "Prohibited Personnel Practices?"

Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law at *§ 2302(b) of title 5* of the United States Code (U.S.C.). A personnel action (such as an appointment, promotion, reassignment, or suspension) may need to be involved for a prohibited personnel practice to occur. Generally stated, § 2302(b) provides that a Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may ***not***:

(1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

- ***EXAMPLE:*** *SUPERVISOR JOE REFUSES TO PROMOTE EMPLOYEE JANE BECAUSE JANE IS A REGISTERED REPUBLICAN.*

(2) solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;

- ***EXAMPLE:*** *SELECTING OFFICIAL JOE HIRES APPLICANT JACK BASED ON SENATOR SMITH'S RECOMMENDATION THAT JACK BE HIRED BECAUSE JACK IS A CONSTITUENT.*

(3) coerce the political activity of any person;

- ***EXAMPLE:*** *SUPERVISOR JANE TAKES AWAY SIGNIFICANT JOB DUTIES OF EMPLOYEE JACK BECAUSE JACK WON'T MAKE A CONTRIBUTION TO JANE'S FAVORITE CANDIDATE.*

(4) deceive or willfully obstruct anyone from competing for employment;

- ***EXAMPLE:*** *SUPERVISOR JOE, LOCATED IN HEADQUARTERS, ORDERS THAT NO VACANCY ANNOUNCEMENTS BE POSTED IN THE FIELD OFFICE WHERE EMPLOYEE JACK WORKS BECAUSE HE DOESN'T WANT JACK TO GET A NEW JOB.*

(5) influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;

- ***EXAMPLE:*** *SUPERVISOR JANE, IN AN EFFORT TO HIRE EMPLOYEE JOE, TELLS EMPLOYEE JACK – A QUALIFIED EMPLOYEE – THAT HE SHOULDN'T APPLY FOR A POSITION BECAUSE HE ISN'T QUALIFIED AND WON'T BE SELECTED.*

(6) give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;

- ***EXAMPLE:*** *SUPERVISOR JANE SPECIFIES THAT SPANISH-SPEAKING SKILLS ARE NECESSARY FOR A VACANT*

POSITION, IN ORDER TO SELECT EMPLOYEE JACK, WHO SPEAKS FLUENT SPANISH. THE POSITION, HOWEVER, DOESN'T REQUIRE SPANISH-SPEAKING SKILLS.

(7) engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives);

- ***EXAMPLE:*** *SECOND-LEVEL SUPERVISOR JANE ASKS FIRST LEVEL SUPERVISOR JOE TO HIRE HER SON.*

(8) engage in reprisal for whistleblowing – i.e., take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);

(9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising

such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;

(10) discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others;

(11) take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and

(12) take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at *5 U.S.C. § 2301.*

- ***EXAMPLE:*** *MANAGER JANE DECIDES NOT TO HIRE APPLICANT JOE BECAUSE HE IS A MEMBER OF AN ORGANIZATION THAT OFTEN TAKES POSITIONS THAT MANAGER JANE BELIEVES ARE CONTRARY TO THE POSITIONS TAKEN BY THE CURRENT ADMINISTRATION.*

No selection based on such a factor appears to violate merit principles, which, among other things, state that:

1. Selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

2. All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, with proper regard to their privacy and constitutional rights.

Who can be protected by the Office of Special Counsel (OSC) from prohibited personnel practices?

General. OSC has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies and the Government Printing Office.

Limited Jurisdiction; whistleblower protection. OSC has jurisdiction over allegations of whistleblower retaliation for employees of – the government corporations listed at *31 U.S.C. § 9101*; the Transportation Security Administration (TSA).

Limited Jurisdiction; U.S. Postal. Service (USPS) nepotism allegations. Under a Memorandum of Understanding (MOU) between OSC and USPS, OSC refers alleged violations of the anti-nepotism statute (*5 U.S.C. § 3110*) to USPS for investigation. Once USPS completes its investigation, it reports its findings and any proposed action to OSC.

Who is not protected by OSC from prohibited personnel practices?

OSC has no jurisdiction over prohibited personnel practices committed against employees of –

- the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President;
- the General Accounting Office;
- the Federal Bureau of Investigation;
- the U.S. Postal Service (except for nepotism allegations; see above); and
- the Postal Rate Commission.

(The process for protecting FBI whistleblowers is contained at 28 CFR part 27.)

Are Federal employees required to cooperate with OSC investigations?

Title 5 of the U.S. Code authorizes the OSC to issue subpoenas for documents or the attendance and testimony of witnesses. During an investigation, the OSC may require employees and others to testify under oath, sign written statements, or respond formally to written questions.

Federal employees are also required to provide to the OSC any information, testimony, documents, and material, the disclosure of which is not otherwise prohibited by law or regulation, in investigations of matters under civil service law, rule, or regulation, The same rule requires Federal agencies to make employees available to testify, on official time, and to provide pertinent records to the OSC.

Ref: *5 U.S.C. § 1212(b)*; Civil Service Rule 5.4

What legal responsibilities do Federal agencies have to prevent prohibited personnel practices?

Section 2302(c) of title 5 requires Federal agency heads, and officials with delegated authority for any aspect of personnel management, to: prevent prohibited personnel practices, including reprisal for whistleblowing; comply with and enforce civil service laws, rules, and regulations; and ensure (in consultation with the OSC) that Federal employees are informed of their rights and remedies.

[LOGO] **U.S. Merit Systems Protection Board**
Office of the Clerk of the Board
1615 M Street, NW, 5th Floor
Washington, DC 20419
Phone: 202 653 7200, Fax: 202 652 7130, E-Mail: MSPB.gov
Clerk of the Board

December 18, 2009

Mr. Joe Carson
10953 Twin Harbour Drive
Knoxville, TN 37934

Dear Mr. Carson:

This is in response to a Freedom of Information Act (FOIA) request dated November 14, 2009, in which you request copies of all documents "related to the [Merit Systems Protection Board's (MSPB)] compliance with 5 U.S.C. 2302(c) by which the Chair/ Board members are required to 'prevent prohibited personnel practices (PPP's)' in MSPB." We have processed your request in accordance with MSPB regulations at 5 CFR Part 1204 that implement FOIA.

We have conducted a search of MSPB records based on the information you provided, and we cannot locate any documents responsive to your request.

You have the right to appeal this determination that there are no existing records. If you decide to do so, your appeal should be addressed to the Chairman, U.S. Merit Systems Protection Board, 1615 M Street, 5th Floor, Washington, DC 20419. Your appeal should be identified as a "FOIA Appeal" on both the letter

and the envelope. It should include a copy of your request, a copy of this letter, and your argument for overturning this decision. The MSPB must receive your appeal within 10 workdays of the date of this letter.

Sincerely,

/s/ William D. Spencer
William D. Spencer
Clerk of the Board

CORPORATE CRIME REPORTER – WHISTLEBLOWER ADVOCATES HAVE A SEAT AT OBAMA'S TABLE

by the Corporate Crime Reporter

For the first time in decades, advocates for government whistleblowers have a seat at the White House policy table.

"After 1,000 points of darkness, we now have 1,000 points of light," Tom Devine, legal director of the Government Accountability Project told Corporate Crime Reporter last week.

"Before President Obama – either the Republicans didn't have the time of day for us, or the Democrats like Clinton and Carter didn't have the time of day for us until the decision was made and then they would call us in and say – thank you for all you have done. But we never had a voice before the decisions were made until the decisions were made."

Devine said that President Obama "has enfranchised the civil liberties activists for the first time in 30 years."

"Now we have a voice," Devine said. "We are meeting with White House ethics counsel Norm Eisen. We are meeting with the general counsel for the Office of Management and Budget. We are meeting with the top appointees at the Department of Justice."

"It has made a major difference – step by exhausting plodding step," Devine said.

"The Obama administration started out with positions that largely reflected the career staff it inherited," Devine said. "But they were preliminary policies. And they gave us the opportunity to rebut them."

"They have listened to our rebuttals. And they have reversed many long standing bureaucratic positions. Not as many as we think are necessary for a best practices whistleblower law like the president campaigned for. But it leaves behind in the dust the concessions and flexibility of any other president."

"The result is that for the first time in 30 years, we have the key Senate approvals to get jury trials to enforce government whistleblower rights. We've been fighting for that for three decades and consistently hitting a wall."

"And this July, thanks to going to the mat, behind closed doors, all out advocacy by the Obama administration, the senate committee approved it and it's a foregone conclusion now."

"Instead of being sent to administrative boards that are kangaroo courts to enforce their rights, whistleblowers are going to have access to juries of citizens now."

"The other victory will be opening up normal access to the appeals courts to challenge interpretations of law that have gutted the whistleblower protection act in the past," Devine said. "The primary reason the whistleblower protection law has failed is because the

appeals court has functionally overturned the statute three times on non constitutional grounds. Since October 1994 when it was enacted, that court has ruled against whistleblowers in 203 out of 206 decisions on the merits."

But Devine expressed frustration with the Obama administration when it comes to national security (CIA, FBI and NSA) whistleblowers.

"The experience has almost been the opposite so far on national security whistleblowers," Devine said. "The administration has been close minded about giving them normal access to court."

"Since their disclosures have been the most important exercise of freedom of speech, defending liberty from threats by your own government, that they are the most important whistleblowers to earn first class rights," Devine said.

NWC Calls for Immediate Appointment of New Special Counsel

Washington D.C. April 23, 2010. Yesterday, former U.S. Special Counsel Scott Bloch was charged with criminal contempt of Congress for withholding "pertinent" information from the House Oversight and Government Reform Committee. Bloch was forced to resign in October 2008 amid allegations that he retaliated against employees and dismissed whistleblower cases without fully investigating them.

Stephen M. Kohn, Executive Director of the National Whistleblowers Center issued the following statement:

> The Office of Special Counsel (OSC) was disgraced under Bloch and the taxpayers are the ones who suffered. The legal guardian for protecting whistleblowers, was not only engaged in retaliation, but we now learn he criminally covered up misconduct.
>
> Since its inception in 1978, the Office of Special Counsel has failed to live up to its mission of protecting whistleblowers and has been dominated by political appointees. Although the track record of the OSC has been highly criticized over the past 30 years, having the former head of whistleblower enforcement charged with serious criminal misconduct highlights how OSC has been abused by politicians intent on having the foxes guard the chicken coop.
>
> Congress and the President must respond by immediately appointing a new Special Counsel.

The new appointee must be top notch and must have the background and experience, not only as a proven strong advocate for whistleblowers, but as a tough and aggressive enforcement official. For too long the OSC has been seeped in the culture of cover-up. Whistleblowers need a real advocate and a powerful voice within the administration. A new standard must be enforced and never again should this office be disgraced.

President Obama promised during the campaign to appoint a Special Counsel with 'expertise in whistleblower law and a firm commitment to protecting whistleblowers.' It has been over 2 years since President Obama made this promise, and no nomination has even been sent to the Senate for confirmation.

[SEAL] U.S. Department of Justice

Ronald C. Machen Jr.
United States Attorney for the District of Columbia

Judiciary Center
555 Fourth Street, NW
Washington, D.C. 20530

PRESS RELEASE

FOR IMMEDIATE RELEASE
Tuesday, April 27, 2010

For Information Contact:
Public Affairs
(202) 514-6933
http://www.usdoj.gov/usao/dc/Press_Releases/index.html

Former Head of the U.S. Office of Special Counsel Pleads Guilty to Criminal Contempt of Congress

Washington, D.C. – The former head of the United States Office of Special Counsel ("OSC"), Scott J. Bloch, pled guilty today to Criminal Contempt of Congress for willfully and unlawfully withholding pertinent information from a House committee investigating his decision to have several government computers wiped, announced U.S. Attorney Ronald C. Machen Jr., Office of Personnel Management ("OPM") Inspector General Patrick McFarland, and Federal Bureau of Investigation ("FBI") Assistant Director in Charge Shawn Henry.

The plea was entered before U.S. Magistrate Judge Deborah A. Robinson, in U.S. District Court for the District of Columbia, who scheduled sentencing for July 20, 2010. Bloch faces a maximum sentence of one-year in jail and a fine of $100,000. Bloch's likely sentencing range is 0 to 6 months in jail under the Federal Sentencing Guidelines.

The OSC is an independent federal agency charged with safeguarding the merit-based employment system by protecting federal employees and applicants from prohibited personnel practices, with an emphasis on protecting federal whistleblowers. Bloch, a presidential appointee whose title was Special Counsel, headed the OSC from 2004 through 2008.

According to the Statement of Offense, on March 4, 2008, Bloch submitted to a transcribed interview with staff members of the U.S. House of Representatives Committee on Oversight and Government Reform ("House Oversight Committee"), which was investigating, among other things, whether and why Bloch: (i) directed the deletion of emails or files on any of Bloch's OSC-issued computers in December of 2006 by using the computer repair service Geeks On Call; (ii) directed that Geeks On Call delete emails or files contained on the computers of two of his OSC aides; and (iii) directed that any such deletion of computer files be done by use of a "seven-level wipe" process. This duly empowered Congressional inquiry came after various media reports that Bloch had directed the deletion of files on several OSC-issued

computers by enlisting Geeks On Call to perform a "seven-level wipe" on them.

The Statement of Offense describes five separate exchanges during Bloch's March 4, 2008 interview with staff members of the House Oversight Committee during which Bloch unlawfully and willfully withheld pertinent information from the Committee. Bloch admitted in Court today that he refused and failed to state fully and completely the nature and extent of his instructions that Geeks On Call perform "seven-level wipes" on his OSC computers as well as the two OSC-issued computers of two non-career OSC staff members in December of 2006.

In announcing today's guilty plea, U.S. Attorney Machen, OPM Inspector General McFarland, and FBI Assistant Director in Charge Henry praised the outstanding work of the investigative agents involved in this matter, especially Special Agent Marc R. Diehl and Andrew Smallman of the FBI, as well as Jill P. Maroney, Deputy Assistant Inspector General for Investigations, and J. David Cope, Assistant Inspector General for Legal Affairs of OPM. They also acknowledged the hard work of paralegal specialists Diane Hayes and Mary Treanor, legal assistant Jamasee Lucas, former legal assistant April Peeler, Supervisory IT Specialist, Joe Calvarese, Assistant U.S. Attorneys Laurel Loomis Rimon, Dan Butler, James Mitzelfeld, and Glenn S. Leon, who is prosecuting the case.

No. 09-1207

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR REHEARING

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

TABLE OF CONTENTS

Page

ARGUMENT 1

TABLE OF AUTHORITIES

STATUTES

5 U.S.C. § 1101 "endnotes" 2

5 U.S.C. § 1201 "endnotes" 2

Pub. L. No. 95-454 2

Pub. L. No. 101-12 2

RULES

Sup. Ct. R. 15.8 1

Sup. Ct. R. 44.2 ..... 1, 2

ARGUMENT

By Supreme Court Rule 44.2, the grounds of this petition "shall be limited to intervening circumstances of a substantial or controlling effect."

Absent the Solicitor General informing Mr. Carson, in the relatively near future, that it supports this petition for rehearing and intends to file a response in acquiescence, if the Court grants this petition for rehearing and invites a response from the Solicitor General to his petition for certiorari, there are no grounds for the Court to grant this petition.

If the Solicitor General so informs Mr. Carson, he will file a supplemental brief, per Supreme Court Rule 15.8, to inform the Court of the "other intervening matter not (now) available."

Mr. Carson, and a number of others, are now trying to persuade the three members of the Merit Systems Protection Board, the Secretary of Energy, and the President to request the Solicitor General so inform Mr. Carson.

The fundamental purpose of the Civil Service Reform Act of 1978 was to create a statutory framework by which federal employees, in the Department of Energy and elsewhere, can perform their duties in a trustworthy – ethical, competent and accountable – fashion, per the merit system principles, while being adequately protected from reprisal and

other types of prohibited personnel practices.[1] Mr. Carson believes this case could, either directly and/or indirectly, significantly advance that purpose, but if the Solicitor General does not agree, then there is no reason to grant this petition for rehearing.

Respectfully submitted,

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

---

[1] See Civil Service Reform Act of 1978, "Findings and Statement of Purpose," Section 3 of Pub. L. No. 95-454, codified in 5 U.S.C. § 1101 "endnotes." The Congressional Statement of "Findings and Statement of Purpose," Section 2 of the Whistle Blower Protection Act of 1989, Pub. L. No. 101-12, codified in 5 U.S.C. § 1201 "endnotes" amplified the importance of protecting federal employees from reprisal and other prohibited personnel practices.

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

_____

Joseph P. Carson